'BRN-1'

Federal Court of Australia
District Registry: New South Wales Registry
Division: General

No: NSD689/2023

BEN ROBERTS-SMITH
Appellant

FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) and others named in the schedule
Respondents

ORDER

JUDGES: Justice Perram

DATE OF ORDER: 2 April 2025

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. The Respondents to file and serve any affidavit evidence by 4 pm on Monday 14 April 2025.
2. The Appellant to file and serve any affidavit evidence in reply by 4 pm on Tuesday 22 April 2025.
3. The Appellant to file and serve submissions by Thursday 24 April 2025.
4. The Respondents to file and serve submissions by Tuesday 29 April 2025.
5. There be listed before the Court on Thursday 1 May 2025 and Friday 2 May 2025 the hearing of the appellant's interlocutory application together with all submissions the parties intend to make on the appeal if leave be granted to amend the notice of appeal.
6. Without prior leave of the Court written submissions are not to exceed 10 pages.
7. The parties provide the Court with an application book in digital format together with 4 paper copies thereof before 11 am on Wednesday 30 April 2025.

Date orders authenticated: 2 April 2025

Registrar

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

Schedule

No: NSD689/2023

Federal Court of Australia
District Registry: New South Wales Registry
Division: General

Second Respondent	NICK MCKENZIE
Third Respondent	CHRIS MASTERS
Fourth Respondent	DAVID WROE

MinterEllison.

3 April 2025

Monica Allen
Special Counsel
BlackBay Lawyers
Level 17, 20 Martin Place
Sydney NSW 2000

Dear Ms Allen

Ben Roberts-Smith VC MG & Anor v Fairfax Media Publications Pty Limited & Ors Federal Court of Australia Proceedings No. NSD 1485, 1486, 1487 of 2018 and NSD 689, 690 and 691 of 2023

1. We refer to your client's Interlocutory Application dated 27 March 2025 (**Application**), your client's proposed Amended Notice of Appeal and the Case Management Hearing in this matter on 31 March 2025.

2. In support of the Application, your client has served two affidavits of Ms Monica Allen, being affidavits sworn on 27 March 2025 and 30 March 2025.

3. We understand that:

   (a) Ms Allen's two affidavits (including Exhibit MHA-1 to the 27 March 2025 affidavit) comprise the entirety of the evidence upon which your client relies in chief on the Application; and

   (b) Ms Allen's 27 March 2025 affidavit and Exhibit MHA-1 comprise the entirety of the further evidence your client seeks leave to adduce on the appeal.

4. We are preparing for the hearing on 1 and 2 May 2025 on the basis of the understanding recorded in the preceding paragraph. If our understanding is incorrect, please let us know.

5. Ground 17 of the proposed Amended Notice of Appeal is in these terms:

   17. There has been a miscarriage of justice and denial of a fair trial to the Appellant in the proceedings below by reason of the Second Respondent's misconduct.

6. The proposed Particulars to Ground 17 are set out in the Annexure to the proposed Notice of Appeal. Paragraph 35 of that Annexure is in the following terms:

   35. The Second Respondent, Mr McKenzie, engaged in wilful misconduct in the proceedings below by improperly and unlawfully obtaining and retaining information concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant.

7. Paragraph 36 then refers to the "Second Respondent's misconduct". Paragraph 37 asserts that there is "at least a real possibility that, had the Second Respondent not engaged in such misconduct, the result of the trial would have been different". In each case, we understand the reference to the "misconduct" to be a reference to that particularised in paragraph 35 of the Annexure to the proposed Amended Notice of Appeal. Again, please let us know if we are mistaken as we are proceeding on that basis.

8. No paragraph of the proposed Amended Notice of Appeal or its particulars asserts any misconduct on the part of any person other than the Second Respondent, or that any other person "improperly and unlawfully" obtained or retained "information concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant." That is, there is no equivalent to paragraph 35 of the proposed Amended Notice of Appeal in respect of any person other than the Second Respondent.

9. Despite this, at the Case Management Hearing on 31 March 2025, Mr Moses SC said this (T3.12 – 3.34, emphasis added):

> But that will be subject to the nature of the evidence to be called by the respondents. There may be issues that emerge that – which will require cross-examination of those who would be giving evidence. It may be the respondents' lawyers – because there are certain issues there in terms of their involvement and meetings.
>
> ...
>
> So it will depend on, for instance, whether Mr McKenzie is being called, whether Ms Roberts is being called, *whether the lawyers are being called. I mean, there were meetings that are attested to in April 2021 involving counsel – Mr Owens, who's now a judge of this court, Mr Levitan* – who were present with Ms Roberts, and then *issues or developments in April 2021 in terms of contention, certainly, on our part*.

10. Mr Moses SC then said this (T3.45 – 4.5, emphasis added):

> Our view would be – your Honour, we say this perhaps because we have an obligation to raise it at the earliest possible opportunity – is that it may be more appropriate for the Full Court to deal with this under the doctrine of necessity because, if it's allocated to single judge to deal with, there are questions that will arise of apprehension of bias given that one of the individuals involved is now a sitting judge of this court, in terms of his name will come up and *inferences may need to be drawn in respect of his involvement* or otherwise *at meetings* and what was said. We don't know.

11. The submissions of Mr Moses SC quoted above are outside your client's proposed Amended Notice of Appeal. There is no suggestion in that document that there has been any misconduct or impropriety by any person other than the Second Respondent. Any such allegations would be extremely serious, particularly if made against legal practitioners. They would need to be explicitly particularised in your client's proposed Amended Notice of Appeal.

12. That is so for at least two reasons. First, so that our clients have proper and fair notice of the case that they are required to meet on the Application and the proposed Amended Notice of Appeal.

13. Secondly, insofar as the Appellant intends to make serious allegations against legal practitioners that they failed to fulfil their legal and ethical obligations, those persons may be necessary parties to the Application and, if leave to amend is granted, to Ground 17 of the Appeal.

14. We observe in this context that the position in relation to persons other than the Second Respondent does not appear to fall within what Mr Moses SC described as the "Donald Rumsfeld issue" (T4.7). That is because Mr Moses explicitly referred to meetings in April 2021 attended by Mr Owens SC (as his Honour then was) and Mr Levitan. Mr Moses SC appeared to say that such meetings were an aspect of your client's "contentions" on the Application and proposed Amended Notice of Appeal. There is no reference to those matters in the particulars to Ground 17 of the proposed Amended Notice of Appeal. Again, they are outside your client's case on the Application and, if leave is granted, the foreshadowed ground of appeal.

15. When our clients agreed to the timetable for the preparation of the Application, we did so on the basis of the understanding recorded in paragraph 3 above, and relying on the fact that your client's proposed Amended Notice of Appeal alleged no impropriety by any person other than the Second Respondent.

16. If that were not the position, our clients would have at least insisted that your client both fully particularise his allegations of misconduct against any person relevant to the Application and adduce all evidence in support of those allegations before our clients were required to put on their evidence. Our clients may also have sought orders deferring any requirement by our clients (and

any affected non-parties) to serve any evidence until your client had closed its case on the Application and, if leave is granted, the Amended Notice of Appeal.

17. In the circumstances, we ask that you confirm, by close of business tomorrow, 4 April 2025, that, on the Application or the Appeal, your client does not allege or assert, and has no present intention of alleging or asserting (pursuant to leave to amend or otherwise):

    (a) any misconduct on the part of any person other than the Second Respondent; or

    (b) that any person other than the Second Respondent improperly or unlawfully obtained or retained information concerning the Appellant's legal strategy concerning the trial, being information that was confidential and privileged to the Appellant.

18. Absent such confirmation, our clients will urgently relist the matter without further notice to you.

19. For the avoidance of doubt, we hold your client to the Application as presently formulated.

Yours faithfully
MinterEllison

Beverley Newbold
Partner

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OUR REF: 1456957

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Sydney NSW 2000

Our ref: BBL:MA:1326

4 April 2025

Ms Beverley Newbold
Minter Ellison
Level 40, Governor Macquarie Tower
SYDNEY NSW 2000

By email: beverley.newbold@minterellison.com

Dear Ms Newbold

Ben Roberts-Smith VC MG v Fairfax Media Publications Pty Ltd & Ors
Federal Court of Australia Proceedings No. NSD 689, 690 and 691 of 2023

We refer to your letter of 3 April 2025, which we received at 9.27pm yesterday. It is not clear as to whether your letter was sent on behalf of the named Respondents or the legal representatives of the Respondents at the trial.

Your letter relates to the Interlocutory Application and proposed Amended Notice of Appeal, which you have had since 27 March 2025, and to submissions our Senior Counsel made at the Case Management Hearing on 31 March 2025.

We note that none of the matters raised in your letter were raised before Perram J, where your clients were represented by experienced Kings Counsel, Mr Sheahan, Mr Yezerski SC and Ms Ryan (instructed by your firm) - or at any other point in the four days since then, until 9.27pm yesterday. We assume the matters were not raised because there was no proper basis to raise them. In these circumstances, there is no proper basis for your clients' threat to have the matter relisted urgently.

To the contrary, following our Senior Counsel's submissions, Mr Sheahan KC informed his Honour:

> *We're in broad agreement. As far as the structure of the hearing – should it be bifurcated or not -- we're perfectly comfortable with the court proceeding, as it were, on the provisional*

basis that everything will be dealt with together. We have some hesitation about that being decided finally, at this stage, before the evidence is on.

Paragraph 37 of the particulars of the proposed Amended Notice of Appeal clearly alleges that there is a real possibility that use was made of the Appellant's confidential and privileged information by the Respondents in the litigation.

The evidence we have served on the application raises several matters which should also be clear to you. Without being exhaustive, we note:

1. The audio recording of Mr McKenzie records him saying inter alia that Ms Scott and Ms Roberts have been *"actively, like, briefing us on his legal strategy"* and *"one or two things now we know which is helpful"*. Mr McKenzie spoke in the first person plural.

2. The event which first triggered the Appellant's suspicion that improper use was being made of his confidential and privileged information was a Notice to Produce issued on behalf of the Respondents by your firm on 19 April 2021.

3. In her sworn evidence before Besanko J, Ms Roberts (your clients' witness):

    a. stated that she attended meetings in March and April 2021 with Mr McKenzie and Minter Ellison solicitors. She also gave evidence that at least Mr Owens SC, and possibly also Ms Barnett, attended the April 2021 meeting. Her evidence on that occasion was that she never met with Mr McKenzie except in the presence of the solicitors; and

    b. contrary to her sworn evidence before Bromwich J, Ms Roberts also gave evidence that she was aware that Ms Scott was accessing the Appellant's email account throughout 2020 and 2021.

4. The Appellant's email account was unlawfully accessed by Ms Scott on dates including but certainly not limited to 28 March 2021, 29 March 2021, 30 March 2021, 22 April 2021 and 27 April 2021.

Further, you have admitted to us in correspondence that the audio recording of Mr McKenzie is dated approximately 24 April 2021, which is shortly after the Notice to Produce was issued on 19 April 2021, and around the time at which Ms Roberts said she met with Mr McKenzie, Minter Ellison and Mr Owens SC (as His Honour was then).

With respect, it is clear that the Appellant's position is precisely as noted by our Senior Counsel on 31 March 2025: *"it's the Donald Rumsfeld issue in terms of what we know and what we don't know, so we just all have to be careful as to how it's managed, but we would think the safer course would be for the Full Court to deal with it because then the doctrine of necessity would mean that the court has no other option but to deal with it in that manner even though it involves a judge of the court"*.

It is a matter for your clients how they choose to meet the evidence. We do not propose to give you advice about the forensic decisions which your clients must make. If there is an absence of evidence responding to the matters set out above, we will invite the Court to draw inferences as are available based on the totality of the evidence before the Full Court.

We note respectfully however, that as officers of the Court, it goes without saying that if there is anything within the knowledge of your firm and/or Counsel about Mr McKenzie's conduct, the legal practitioners concerned have a positive and independent obligation to give that explanation to the Court.

Finally, we have noted your comment that *"we hold your client to the Application as presently formulated"*. In light of the matters dealt with above, there is no reason for the matter to be re-listed.

Yours sincerely
BlackBay Lawyers

Monica Allen
Special Counsel
monica.allen@blackbaylawyers.com

MinterEllison.

8 April 2025

Monica Allen
Special Counsel
BlackBay Lawyers
Level 17, 20 Martin Place
Sydney NSW 2000

Dear Ms Allen

Ben Roberts-Smith VC MG & Anor v Fairfax Media Publications Pty Limited & Ors Federal Court of Australia Proceedings No. NSD 1485, 1486, 1487 of 2018 and NSD 689, 690 and 691 of 2023

1. We refer to our letter of 3 April 2025 and your letter of 4 April 2025.

2. We understand from your letter that the Appellant does not make any allegation that any person other that the Second Respondent engaged in any misconduct. No such allegation is made anywhere in the Appellant's Interlocutory Application or the proposed Amended Notice of Appeal. Nor is such an allegation articulated in your letter.

3. Indeed, insofar as you assert in your letter that the Appellant's position is affected by the "Donald Rumsfeld issue", that can only mean that you accept that your client does not know of any proper basis to allege wrongdoing by any person other than the Second Respondent.

4. In our letter, we alerted you to the prejudice that would be suffered by our clients and, potentially, non-parties if your client attempts to depart from the Interlocutory Application and proposed Amended Notice of Appeal as presently formulated in the future. We take the last paragraph of your letter to confirm your understanding that the Respondents hold the Appellant to the Interlocutory Application and proposed Amended Notice of Appeal as formulated.

5. In these circumstances, our clients will not re-list the matter at this time.

Yours faithfully
MinterEllison

Beverley Newbold
Partner

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9 April 2025

Ms Beverley Newbold
Minter Ellison
Level 40, Governor Macquarie Tower
SYDNEY NSW 2000

By email: beverley.newbold@minterellison.com

Dear Ms Newbold

Ben Roberts-Smith VC MG v Fairfax Media Publications Pty Ltd & Ors
Federal Court of Australia Proceedings No. NSD 689, 690 and 691 of 2023

We refer to your letter dated 8 April 2025, sent to us at 9.48pm last night.

With respect, it appears that your two most recent letters are a pre-emptive attempt to justify a decision by your clients not to adduce from their legal representatives.

In your letter, you assert that no allegation of "misconduct" is made anywhere in the Interlocutory Application or the proposed Amended Notice of Appeal, other than against the Second Respondent. It is unclear what you mean by "misconduct" in the context of your correspondence.

Once again, we draw your attention to paragraph 37(b) in the particulars of the Amended Notice of Appeal. Our client alleges, unambiguously, that there is a real possibility that, by reason of the Respondents' improper access to the Appellant's confidential and privileged information, they (collectively) have made forensic decisions in the litigation which they would not otherwise have been in a position to make.

Our letter dated 4 April 2025 set out several matters in the evidence filed in support of the application, concerning the possible role played by the Respondents' legal representatives in relation to the use of the Appellant's confidential and privileged information. These include but are not limited to the presence of Minter Ellison solicitors and counsel at meetings between Mr McKenzie and Ms Roberts, and the issuing of the Notice to Produce by your firm on 19 April 2021.

As we stated in our letter dated 4 April 2025, it is a matter for your clients how they choose to meet the evidence and make forensic decisions prior to filing their evidence on 14 April 2025. However, we note the following:

1. The evidence on the application and, if reopened, the appeal, will be weighed according to the capacity of a party to adduce it. See for example *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970. This principle is applicable to the meetings and the Notice to Produce.

2. If only Mr McKenzie and/or Ms Roberts and/or Ms Scott are called to assert that there was no disclosure of the Appellant's confidential and privileged information at those meetings, the Appellant's submission will be that an inference should be drawn – consistent with *Jones v Dunkel* (1950) 101 CLR 298 – that the evidence of the lawyers who were also present at those meetings would not have assisted the Respondents' case on matters including, but not limited to, access to the Appellant's confidential and privileged information and the use of that information. While the Appellant does not contend that such a *Jones v Dunkel*-type inference permits a positive finding that the lawyers' evidence would have been adverse, it does allow the Court more readily to accept the Appellant's contentions, as may emerge on the totality of the evidence, that there was probable use of that confidential and privileged information by the Respondents' lawyers in a manner detrimental to the Appellant's interests.

3. The Appellant would submit that an adverse inference should also be drawn from any failure to tender any documentary evidence relating to file notes which were made of these meetings. See for example *Commercial Union Assurance Co of Australia Limited v Ferrcom Pty Ltd* (1991) 2 NSWLR 413 at 418.

We note that you have raised the issue of prejudice. There can be no prejudice to any of your clients, as it is clear what contentions will be made based on the Interlocutory Application, the proposed Amended Notice of Appeal and the evidence that has been filed. It is clear what case your clients must meet: *Banque Commerciale SA, En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 at 286.

With respect, the complaint of prejudice is also misconceived, because it fails to account for the legal representatives' ethical obligations as officers of the Court. Your clients' legal representatives are in a far better position than our client to know precisely whether, how and to what extent they used the Appellant's confidential and privileged information in the proceedings. If any such use has been made, it is incumbent upon them as officers of the Court to disclose it to the Court and explain fully and frankly how such a thing occurred. Even if the proposed Amended Notice of Appeal did not raise a distinct issue which related to the lawyers (which we do not accept to be the case), that fact would not absolve the legal practitioners involved of their ethical obligations to the Court: *NHB Enterprises Pty Ltd v Corry (No 5)* [2020] NSWSC 1838 at [6] (Ward CJ in Eq, as the President then was).

The matters that are raised are grave and involve improper access to the Appellant's confidential and legally privileged information by the Respondents. These are matters that debased fundamental premises of the Appellant's right to a fair trial and undermined the administration of justice by the Federal Court. Your clients can be under no misapprehension as to the gravity of the findings which the Appellant will submit should be made by the Full Court.

Finally, we note once again that it has been apparent to you since 27 March 2025, the evidence which would need to be responded to in this matter. There was a case management hearing on 31 March 2025 in which none of these concerns were raised. It was not until your letter of 3 April 2025 which we received at 9.27pm, that these matters were the subject of correspondence. We answered that correspondence on 4 April 2025 in accordance with the arbitrary and self-imposed deadline set by you and have now received your letter dated 8 April 2025 at 9.48pm which attempts to limit what issues you assert can be raised on the Interlocutory Application.

Yours sincerely
BlackBay Lawyers

Monica Allen
Special Counsel
monica.allen@blackbaylawyers.com

Mia Uzunovski

From: Monica Allen <monica.allen@blackbaylawyers.com>
Sent: Wednesday 23 April 2025 11:02 AM
To: Rafael Aiolfi
Cc: Beverley Newbold; James Beaton; Michelle Nguyen; Mia Uzunovski; Victoria-Jane Otavski
Subject: RE: Reply Evidence - Ben Roberts-Smith v Fairfax Media Publications & Ors (NSD 689, 690 and 691 of 2023)

Dear Mr Aiolfi

We confirm that the Appellant does not intend to serve affidavit evidence in reply.

Kind regards

Monica Allen
Special Counsel

BLACKBAY LAWYERS

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From: Rafael Aiolfi <Rafael.Aiolfi@minterellison.com>
Sent: Wednesday, 23 April 2025 10:36 AM
To: Monica Allen <monica.allen@blackbaylawyers.com>
Cc: Beverley Newbold <Beverley.Newbold@minterellison.com>; James Beaton <James.Beaton@minterellison.com>; Michelle Nguyen <Michelle.Nguyen@minterellison.com>; Mia Uzunovski <Mia.Uzunovski@minterellison.com>; Victoria-Jane Otavski <victoria.jane@blackbaylawyers.com>
Subject: Reply Evidence - Ben Roberts-Smith v Fairfax Media Publications & Ors (NSD 689, 690 and 691 of 2023)

Dear Ms Allen

We refer to the orders made by Justice Perram for the Appellant to file and serve affidavit evidence in reply by 4pm yesterday. The deadline has now passed.

Could you please confirm by 11am today that the Appellant does not intend to file reply evidence?

Kind regards
Rafael

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TRANSCRIPT OF PROCEEDINGS

O/N H-2015672

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

PERRAM J

No. NSD 689 of 2023
No. NSD 690 of 2023
No. NSD 691 of 2023

BEN ROBERTS-SMITH

and

FAIRFAX MEDIA PUBLICATIONS PTY LTD and OTHERS

SYDNEY

9.35 AM, WEDNESDAY, 23 APRIL 2025

MR A. MOSES SC appears with MR T. SCOTT for the appellant
MR R. YEZERSKI SC appears with MS H. RYAN for the respondents
MS J. SINGLE SC appears for the Commonwealth
MR T.D. BLACKBURN SC appears for Peter Bartlett
MR N.M. BENDER SC appears for Dean Levitan
MR C. JENKIE appears for the ABC

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

MR A. MOSES SC: Your Honour, if it pleases the court, I appear with my learned friend, MR SCOTT, for the appellant.

HIS HONOUR: Yes. Thank you, Mr Moses.

MR R. YEZERSKI SC: If your Honour pleases, my name is Yezerski and I appear with MS RYAN for the respondents.,

HIS HONOUR: Thank you, Mr Yezerski.

MR T.D. BLACKBURN SC: May it please the court, Blackburn for Mr Peter Bartlett who is one of the targets of the subpoenas.

HIS HONOUR: Thank you, Mr Blackburn.

MR N.M. BENDER SC: If your Honour pleases, my name is Bender. I appear for Dean Levitan who's one of the subpoenaed parties.

HIS HONOUR: Thank you, Mr Bender. So how should we do this?

MR MOSES: Your Honour, perhaps first if I can deal with uncontroversial matters, if I could. And that is to provide your Honour with our understanding of what the status of the subpoenas are at this stage and who has complied. Person 17, your Honour, her solicitors, Giles George, have accepted service. They don't oppose the subpoena and have made production of the first tranche to the registry on 22 April and a second tranche will be produced on Thursday 24 April. We understand that there has been a communication sent to the court to that effect this morning. We would seek immediate access to the production of the documents that have been produced so far. That's the first subpoena.

HIS HONOUR: Well, there's an application now to set that subpoena aside so - - -

MR MOSES: Quite.

HIS HONOUR: - - - would I grant access before that application has been determined?

MR MOSES: Well, I'm assuming, your Honour, our friends will oppose that, but I make the formal application.

HIS HONOUR: Right.

MR MOSES: The second subpoena, your Honour, is to Ms Danielle Scott. The position is that no documents have been produced, as we understand the

communication that has been received ultimately from those acting for her is that she has no documents to produce. That's a surprising response, given everything we know now through Mr McKenzie's affidavit. And this person was key presence at meetings and communications with him. We're considering the appropriate next steps. Obviously, setting aside that subpoena would be of no utility given the response, your Honour. The more appropriate question may be whether further orders should now be made to compel - - -

HIS HONOUR: Well, that doesn't make sense, does it?

MR MOSES: - - - compliance.

HIS HONOUR: If the subpoena were – I can see why you're entitled to cross-examine her on the return of the subpoena or to make further orders.

MR MOSES: Quite.

HIS HONOUR: But if the subpoena was set aside, that would fall away.

MR MOSES: Then that would fall away. Absolutely.

HIS HONOUR: Yes.

MR MOSES: Second, your Honour, Ms Emma Roberts. Multiple attempts have been made to serve her at her last known physical address that have failed. We will be seeking an order for substituted service either on her former solicitor, Mr Murakami of BMG Legal, who acted for her during the trial, or alternatively by an email to an address that's understood she continues to use. We have an affidavit in support of that, your Honour, that we would rely upon as well to seek that order which I could provide to your Honour now.

HIS HONOUR: Yes. All right. I will just indicate I'm not going to do anything at this stage - - -

MR MOSES: No, of course.

HIS HONOUR: - - - until I've heard from everyone. So - - -

MR MOSES: No, of course. All I'm doing is providing your Honour with the updates as to where things are up to with the subpoenas that were issued by the court.

HIS HONOUR: Yes.

MR MOSES: I will just indicate to your Honour that the affidavit I've provided to your Honour of Ms Allen basically sets out the steps that were taken by the process server to serve the subpoena unsuccessfully and then sets out at MH3 that on 22 April, Ms Allen was copied to correspondence from MinterEllison to Mr Murakami.

I'm not sure what, if anything, there has been received in response to that. The ABC, your Honour, is the next recipient of a subpoena to produce documents. The ABC has been served and we understand the ABC resists compliance pending the court's determination of the respondent's application to set it aside. What we've indicated to those acting for the ABC is that those documents should still have been produced this morning and issues of access, of course, would be matters that would be dealt with by the court pending that application being dealt with, but we understand they have not complied with that subpoena.

They've taken the position that they should await the outcome of the application which we say is entirely inappropriate because there's an outstanding subpoena that they must comply with and the matter should not be delayed in respect of the matter. And it's to that end, your Honour, as we understand it, for whatever reason, the respondent solicitors – we only learnt this after the event – took it upon themselves to unilaterally communicate with representatives of the subpoenaed recipients, specifically Person 17 and ABC, as far as we know at this stage, in respect of the subpoenas. It would appear that the ABC has taken the position because of that, that they should not have to comply until the application is dealt with. We say that is not appropriate; they should just comply with the subpoena without further delay.

So that's the position on the subpoenas to produce documents, your Honour. As we understand it, both Mr Levitan and Mr Bartlett, in terms of the subpoenas addressed to them, the position is also taken, of course, that it should be set aside. And that's the application that is the subject of the matter that your Honour received communication about late yesterday and submissions this morning, I think about 10 minutes ago.

HIS HONOUR: So I don't have an application from Mr Levitan and Mr Bartlett, as I understand it - - -

MR MOSES: No, that's correct.

HIS HONOUR: - - - to set aside the subpoenas, but I assume that's why Mr Blackburn and Mr Bender are here.

MR MOSES: Well, what we were told, your Honour – but my friends will correct me if I'm wrong, we were told that my learned friend, Mr Blackburn, would be foreshadowing an application this morning that the subpoena to give evidence to Mr Bartlett, who is now represented by a different firm, should be set aside. That's all we were told. We haven't, to my knowledge, been served with any application to that effect or the basis of it set out in THE written submissions that we've received so far. We've been told that, in effect, I think it was some sort of assertion of a fishing expedition that were one of the reasons why it should be set aside. Mr Levitan is represented by another firm, a different firm to Mr Bartlett and I understand that his lawyers will be taking the same position. But I don't understand them to be making an application to set aside the subpoenas to produce documents

that may impact upon them, that might be a matter that is being dealt with by the nine parties, or the respondents.

HIS HONOUR: All right.

MR MOSES: So that's what we understand to be the position. Our friends, I think, have indicated, your Honour, that they wish the application to be heard this morning, subject to your Honour's availability. We were only notified of that yesterday evening by our friends. As I said, we received submissions about 10 minutes ago. Our desire is that the matter be resolved as soon as possible, given the hearing dates of 1 and 2 May, and the impending retirement of Katzmann J. We will – if the matter needs to be dealt with this morning, of course, come up to speed with the materials that were given to us late yesterday and the submissions, and engage with the application, but it depends on your Honour's availability, and when your Honour would propose to deal with it, either immediately or later today.

We might just need a short time, as I said, to read their submissions, my learned friend for the respondent's provided me with a copy of them just before your Honour came onto the bench. I'm just quickly scanning them, but we will deal with it. Mr Beaton, your Honour, has filed an affidavit in support of that application. He's online, apparently he's in Japan at the moment. We haven't yet formed a concluded view whether there might be some questions I need to ask him because of some of the assertions he has made in that affidavit, which would only take about 10 or 15 minutes to clarify.

HIS HONOUR: I think – I need to be – you will need to address me on this, but the concept of permitting cross-examination on an application to set aside a subpoena which has been issued pursuant to a desire to amend a Notice of Appeal in appellate proceedings, I will need to be - - -

MR MOSES: Of course.

HIS HONOUR: I will need to be strongly persuaded.

MR MOSES: No, of course. But we haven't formed a concluded view, your Honour, because we, as I said - - -

MR YEZERSKI: You have no right.

MR MOSES: Of course.

MR YEZERSKI: You would be asking for leave.

MR MOSES: Of course.

MR YEZERSKI: Yes.

MR MOSES: And we want to consider the submissions, and how they advance that affidavit of Mr Beaton. There are a number of, as I said, it's – I'm not being critical, it's – your Honour is familiar with these type of affidavits, they're rather formulaic in terms of how they deal with these matters. I think he pitches it at 27 days, is my memory of what we saw last night, that they would need to conduct multiple reviews in order to be able to comply with the subpoena. And there's said to be something like over 2000 WhatsApp and text messages between Mr McKenzie and Mr Bartlett and Mr Levitan, that it is said they would need to review. There are some issues about that. We may be able to put a submission without contest about that, without having to challenge him in respect to that issue as well. But that's our understanding of where things are up to, your Honour. As I said, we will, if your Honour is in a position to deal with the application today, we will certainly engage that application today, we might just need a few moments to actually read the submissions.

HIS HONOUR: How long – if we were going to do with it today, being fair to yourself, how long do you need?

MR MOSES: In order to absorb what has being provided? I would have thought, your Honour, an hour.

HIS HONOUR: An hour, right.

MR MOSES: An hour, and then I think we could then proceed.

HIS HONOUR: I'm available all day, so – right.

MR MOSES: We can then proceed. And as I said, I hadn't received submissions from Mr Blackburn and Mr Bender about their applications. I'm not sure if they're ready to proceed with those applications today.

HIS HONOUR: Well, we will find out.

MR MOSES: And I will need to, obviously, understand a bit more about what their applications are based on, because we've only received a very general statement from the solicitors acting for Mr Bartlett, K&L Gates, in respect of what their position is. The only other thing, your Honour, is I should note that we did provide the application, so the request forms that were sent to the court in respect of these subpoenas, we did, even though there was no right to receive them, we did provide them to the parties to try and deal with what were their initial, if I can call it, pieces of communication.

So we've tried to provide as much information as we can, and we've tried to emphasise that these subpoenas were issued by the full court, they're not just rubber stamping exercises, and we've provided them with those applications, I'm not sure how far they engage with the actual applications themselves and the submissions, but I will look at that, because we could deal with it rather shortly, your Honour. That's all I wish to say, your Honour

HIS HONOUR: Thank you, Mr Moses. Yes, Mr Yezerski, what's your position?

MR YEZERSKI: Thank you, your Honour. The starting point is we are ready to proceed with our application to set aside the subpoenas, and also the notice to produce issued to Mr McKenzie today. There's obviously no difficulty in giving Mr Moses an hour or so if he needs that time, and we can certainly accommodate that, and I can be available all day. The – so in addition, as I say, in addition to the subpoenas to produce, there's the issue of the notice – the subpoenas to produce, there's the issue of the notice to produce and then separately, although there's no formal application before your Honour, there is the question of the subpoenas to appear.

Can I indicate, given Mr Moses' outline, our position. In relation to the subpoena to person 17, we say no access should be granted to the material that has been produced to date until the application's set aside; that subpoena has been dealt with. We would oppose first access in any event, and we would seek first access if the subpoena was not set aside in circumstances where person 17 was a witness called by the respondents at trial.

MR MOSES: Your Honour, I should indicate that that – that's accepted. We don't dispute that position.

HIS HONOUR: Thank you, Mr Moses.

MR YEZERSKI: In relation to the subpoena to Ms Scott, given what Mr Moses has said – there is utility in continuing to have that – in pressing our application to have that subpoena set aside, because if there's going to be some suggestion of non-compliance with it then there is still utility in pressing that application.

MR MOSES: I don't dispute that, your Honour, either.

HIS HONOUR: Thank you, Mr Moses.

MR YEZERSKI: I was not aware that Ms Roberts had not been served the subpoena to her, but again I don't suggest that that's a reason why we cannot press ahead with our application to set her aside, and indeed, in circumstances where substituted service is being sought that the application to set her aside should be determined first, we do seek to set aside the subpoena to the ABC. I believe that there may be an appearance for the ABC online, your Honour.

HIS HONOUR: Yes, I understand there is.

MR C. JENKIE: Yes, thank you. If it pleases the court – and I apologise, your Honour, I have been sitting on the link but didn't have an opportunity to announce my appearance just yet; I didn't want to interfere – but my name is Jenkie and I appear on behalf of the Australian Broadcasting Corporation.

HIS HONOUR: Thank you, Mr Jenkie. I will come back to you in a few minutes, Mr Jenkie.

MR JENKIE: Yes, thank you.

MR YEZERSKI: So I think perhaps, your Honour, that's all I needed to say in outline other than this. The submissions that we served this morning pick up matters that we set out in a detailed letter to the appellant on Monday, the subpoenas and notices to be used all being served at or after four o'clock on Thursday evening before the public holiday. So we moved quickly. We provided a detailed letter setting out our grounds of opposition. They press the subpoenas and the notice to produce, but we have moved quickly and we don't think there's any prejudice in dealing with the matter today in those circumstances where the submissions have really been foreshadowed since Monday.

HIS HONOUR: What's your time estimate, if we - - -

MR YEZERSKI: Your Honour, the notice to produce and subpoena categories overlap each other substantially, so I will speed up as I go, but to deal with the notice to produce I expect will take some time. There are 10 categories, only, sort of, four of which can be dealt with together, and then speed up after that. At the moment, your Honour, I may be as long as 90 minutes I think to get through the material.

HIS HONOUR: Thank you. Mr Moses, I forgot to ask you a question. In the event that we do press on today, and you get, say, an hour or an hour and a half before the start, how long do you think you will be?

MR MOSES: I'm not sure, your Honour. ..... review the submissions - - -

HIS HONOUR: Yes.

MR MOSES: - - - but your Honour knows I'm rather quick, so – I don't like to linger – so I will look at these and I'm sure there are a few targeted matters that we can raise that bring us right to the heart of what we're dealing with.

HIS HONOUR: All right. Thank you, Mr Moses. Mr Blackburn?

MR BLACKBURN: Thank you, your Honour. Your Honour, our position is that we have instructions to file an application to set aside the subpoena and test of ..... which has been served on Mr Bartlett. It was only – the sealed copy was only served last night. I came into this matter yesterday. We have had the draft for a while, we've notified that the application was being made. So, your Honour, we would be seeking a timetable of some kind of – obviously a very short one – to make that application and put on any evidence in support.

That, of course, leads to a question of when it might be able to be heard. I understand Mr Bender can speak to his client, but I understand that he has the same instructions. The number of grounds in support of the application - - -

HIS HONOUR: So you think you would be in a position to file and say what you wish to say – not orally but by way of paperwork – would you be in a position to do that by the middle of the afternoon today?

MR BLACKBURN: Your Honour, I think not. I have only just come into the matter yesterday and there's a lot to digest. We would prefer, if the court was agreeable, that it could be done perhaps on a slightly longer timetable than that. Perhaps it could be heard early next week. It would probably take an hour – two hours.

HIS HONOUR: All right, so you would like a hearing early next week and a corresponding timetable to go with that, say – yes, okay. I've got that. Mr Bender?

MR BENDER: My client's position in relation to the subpoena to give evidence is the same as Mr Blackburn's position in respect of his client. The appellants were notified of that position last night and our intention is to file an interlocutory application to set aside today. If your Honour is minded, ... as Mr Blackburn has proposed over the next week, that would suit us. In respect of the application to set aside the subpoena to ....., there's no separate application by him to set aside. His position is that he will support the respondent's application. In that respect, I haven't yet digested Mr Yezerski's written submissions, but it's unlikely I will have much of an .....

HIS HONOUR: So does that mean you are going to ride off the back of his application to set aside the document subpoenaed to you?

MR BENDER: I expect so.

HIS HONOUR: All right, but you don't know yet.

MR BENDER: Because I haven't read the submission.

HIS HONOUR: Right. Okay.

MR BLACKBURN: That is also Mr Bartlett's position, your Honour.

MR MOSES: We're all in the same position.

HIS HONOUR: Right. So – all right, well that's – and, well, it's a bit early to say but it sounds like it's a fairly short argument, probably an hour or two. All right. Mr Moses.

MR MOSES: Your Honour, in respect of what's being proposed by my learned friends for Mr Bartlett and Mr Levitan, we don't oppose that as long as it's dealt with expeditiously by them – that is in terms of the filing of whatever they wish to file – to set aside those subpoenas to give evidence. Can I ask, your Honour, if your Honour were to accommodate what my learned friends have raised with you, when would your Honour be contemplating – if your Honour is in a position to deal with the matter early next week as to the hearing - - -

HIS HONOUR: Well, I can do Monday, Tuesday or Wednesday, starting at – I can't start at 9.30 on Monday but can start at 10.15, and I can do 9.30 all day on Tuesday. Nicholas Js farewell ceremony is on Wednesday - - -

MR MOSES: Yes.

HIS HONOUR: - - - so I will be at that. So 10.15 on Wednesday.

MR MOSES: Your Honour, for obvious reasons, we would seek for it to be heard - - -

HIS HONOUR: Earlier.

MR MOSES: - - - as soon as possible in relation to those subpoenas. They are critical witnesses.

HIS HONOUR: So one view – one view would be that we would divide the working days equally between you and fix a Monday, but then another view would be that that's unrealistic and you're both going to steal the long weekend. But you should divide the long weekend between you as well.

MR MOSES: Well, your Honour, what I was contemplating – it's fine, in our role, your Honour, weekends are stolen from us all the time, but we don't complain. But, your Honour, in relation to the hearing date, I was going to propose, your Honour, Tuesday, as I'm in court on Monday, in a matter which would be difficult to offload at short notice. It's a full day hearing, but I could do Tuesday.

HIS HONOUR: All right.

MR MOSES: But if your Honour sets it down for Monday, of course, arrangements will be made to deal with that.

HIS HONOUR: Mr Blackburn and Mr Bender, can you do Tuesday?

MR BLACKBURN: Yes, your Honour.

MR BENDER: Yes, your Honour.

HIS HONOUR: All right. ..... So we will make it 10.15 on Tuesday?

MR MOSES: Please the court.

HIS HONOUR: Then the next question is – I think Mr Blackburn and Mr Bender can file their interlocutory application and affidavit today, and then that leaves one, two, three, four, five days to share between you. I would suggest two and a half each, which would mean Mr Bender and Mr Blackburn serving their submissions at lunchtime on Saturday, I think, and then you serving your submissions at – is that right? Yes.

MR MOSES: Monday?

HIS HONOUR: Yes, end of Monday.

MR MOSES: That's fine, your Honour. Thank you.

HIS HONOUR: Is that fair, Mr Blackburn and Mr Bender, or would you like to have them a little bit more in advance of the hearing?

MR BENDER: A little bit more in advance might ..... your Honour.

HIS HONOUR: Yes. Well, why don't we make it two days and then two days. So Mr Blackburn and Mr Bender by the end of Anzac Day and Mr Moses by the end of Sunday.

MR MOSES: We can do that.

HIS HONOUR: All right. You can stew in them on the Monday. And then fix it for hearing at 10.15 on Tuesday the 29th. So, Mr Moses, can you get your people to do a short minute of order which gives effect to that.

MR MOSES: ..... we will prepare that.

HIS HONOUR: And I will make that during the course of the day at some point.

MR MOSES: We will, your Honour. It will be done. Your Honour, just on the issue raised by my learned friend, counsel for the respondents, concerning Ms Roberts, I think we can deal with the applications first: the application to set aside, then deal with our application for substitute service at the end of that matter. Once that's dealt with, your Honour, if that application needs to be made. So we're content. So, as I said, your Honour, I think an hour will be sufficient for us to review these submissions and deal with our consideration of whether we make an application for Mr Beaton to be cross-examined in respect of this application that is being proposed.

HIS HONOUR: Yes.

MR MOSES: But I have noted what your Honour has said and there may be issues that I could raise with my learned friends as to some solutions that we will make that they won't take any point against us that I haven't sought to question in respect of those matters.

HIS HONOUR: Yes. Can we just try and regularise the document subpoenas to Mr Blackburn and Mr Bender.

MR MOSES: Yes.

HIS HONOUR: Just to know formally whether Mr Yezerski's interlocutory application picks them up or what exactly is the – how exactly is the document subpoenas to Mr Bartlett and Mr Levitan being handled.

MR YEZERSKI: Yes. I'm sorry, your Honour. The respondent's interlocutory application seeks to set aside in whole or in substantial part, the notice to produce and each of the six subpoenas to produce documents, including the two to Mr Bartlett and Mr Levitan.

HIS HONOUR: Right. Okay. So that covers that. So I think what we will do is in relation to the subpoenas to produce documents, we will kick down the road until after the determination of the interlocutory application to set aside the subpoenas all questions of compliance and access; I will make no orders about that. And I would propose, Mr Moses, to give you an hour.

MR MOSES: That's sufficient.

HIS HONOUR: But if you need – if you come to the view that you need a little bit more than that, contact my associate and I will - - -

MR MOSES: Yes. No, your Honour, we will do our best to ensure that we can kick off at 11, your Honour. And as I understand it, my learned friend, of course, will go first. I think he has indicated 90 minutes; that will give me even some further time to catch up with their propositions, but I'm sure an hour will be okay.

HIS HONOUR: All right. Now, I promised Mr Jenkie I would come back to him.

MR JENKIE: Yes, thank you, your Honour. I won't hold everyone up as I – if I understand correctly our issue is being determined and really the only point I was going to make was that the ABC being a third party, there has been some correspondence between us and the solicitors for the issuing party since we were sent and emailed a copy of the subpoena after 4.30 on Good Friday, but if compliance with our subpoena is adjourned or is extended until after the applications to set aside have been determined, then we're content with that course and that was really all we were going to ask for this morning your Honour.

MR MOSES: There's no opposition to that, your Honour.

HIS HONOUR: All right. Well, if I were to extend the time for compliance for the to the ABC to say 10 o'clock tomorrow morning, would that make you happy Mr Jenkie?

MR JENKIE: It would, your Honour, in the circumstance that the application to set aside the subpoena to the ABC had been determined. And - - -

HIS HONOUR: I propose to determine the application today.

MR JENKIE: Very well.

HIS HONOUR: And if I don't determine it today, Mr Jenkie, I will give you another opportunity to extend the time for compliance.

MR JENKIE: Yes, thank you, your Honour. And just to indicate to the court and the parties, if the applications are determined today and the subpoena is not set aside, then yes, I certainly expect that we will be able to comply and produce any documents if there are any by 10 am tomorrow morning.

HIS HONOUR: All right. That needs to be a formal direction so I will make that - - -

MR MOSES: Yes, your Honour, we will incorporate that.

HIS HONOUR: Can you put that in the order?

MR MOSES: Yes, your Honour.

HIS HONOUR: All right. Well, then just before we adjourn, is there anything else which needs to be ventilated?

MR BLACKBURN: Yes, your Honour. There are just two small things – or perhaps not small; the first I think is a small thing and that is that although no formal application has been made, your Honour, I seek the court's permission to be exempted from the suppression orders that were made by Besanko J I think in 2019. I've just come into the matter and there are things I can't see, and since I'm representing Mr Bartlett - - -

HIS HONOUR: That is a can of worms, Mr Blackburn.

MR BLACKBURN: Well, the other thing, your Honour, is the orders that were made for national security purposes. I think the two are separate, are they not? I'm sorry to be - - -

HIS HONOUR: Thus far, Mr Blackburn, I have remained aloof from these matters. I was hoping to keep it that way.

MR MOSES: Your Honour can I indicate this, subject to your Honour's view. I think the issue that my learned friend has raised is an important matter, but it perhaps could be dealt with via communications with the AGS who represent the Commonwealth. They have been usually appearing at these matters, even when they're not needed or wanted, but they're not here this morning for whatever reason. I'm not sure whether they were aware of this morning but they usually turn up and just sit there. There might be somebody here – there is somebody here.

MR BLACKBURN: I think there are two separate – I'm sorry.

MR MOSES: There is a solicitor here. Okay, well they can – they can perhaps send that to her parents and can deal with Mr Blackburn's query, because they're the ones who are driving that aspect of the matter.

MR BLACKBURN: There are two separate things, though, your Honour. There are the orders – as I understand it – there are the orders made by Besanko J in 2019, which deal with the identification of witness 17 and so on, and there are the national security orders which are separate, and which I don't think that the – I might be wrong – but I don't think the AGS has any interest – particular interest anyway.

HIS HONOUR: I know there was a flurry about this the other day, about whether one of the exhibits to Mr McKenzie's affidavit had national security material in it. I must say nothing about the present application looks to me like it's connected with a national security matter, and if it is, it's very tangential.

MR MOSES: I think that observation is correct, your Honour. Just in respect of Mr Blackburn, as my understanding, the person 17 issue is separate from the NSI matter. The identity of person 17 is separate from that. That was a suppression order made in respect of protecting her identity because of reasons advanced concerning her personal circumstances. That was not tethered to the NSI Act, and so, if that's the issue that my learned friend Mr Blackburn is raising, that is a matter that your Honour – if need be, if an order need be made – that I think Mr Blackburn wants to be able to understand who that person is so that he can be told the name of that person. Is that the position?

MR BLACKBURN: Yes, well I want to be exempted from the order, yes.

MR MOSES: Yes. Of course.

MR BLACKBURN: That's – that's correct.

MR MOSES: But I would have thought that's something that isn't NSI related, unless the lawyers who apparently are here for the Commonwealth want to say something to the contrary.

HIS HONOUR: Well, presumably Mr Bartlett and Mr Levitan – they know all of this material - - -

MR BLACKBURN: Yes, they do, so I should - - -

HIS HONOUR: - - - because of their position. So you're in an unusual situation where your client knows and you don't.

MR BLACKBURN: That's right. It's just a simple matter of amending order 2, as I see it, of the order was made on 6 February 2019 to include myself.

MR MOSES: Your Honour, may I just approach my learned friend for a moment? Your Honour, can I suggest that also we take on the drafting exercise to do with what my learned friend has raised, which will incorporate the draft short minutes and provide it to him for his consideration through his lawyers – solicitors before it is sent to your Honour's chambers.

HIS HONOUR: I assume – I don't know anything about the confidentiality order made six years ago by Besanko J, but I'm assuming it has got something like counsel and solicitors can know, but - - -

MR BLACKBURN: For the parties. For the parties.

HIS HONOUR: - - - is there an undertaking, or are they covered by the - - -

MR MOSES: For the parties, and the point – yes – the point – yes.

MR BLACKBURN: ..... so that - - -

HIS HONOUR: You and Mr Bender need to be brought into the tent as everyone else is.

MR BLACKBURN: Yes.

MR MOSES: Yes.

HIS HONOUR: All right. Can you do that in your orders?

MR MOSES: Well, we won't be doing any massaging, your Honour. We will do some drafting.

HIS HONOUR: Thank you. That would be very good.

MR MOSES: Yes. Thank you.

HIS HONOUR: So that's the little matter, Mr Blackburn?

MR BLACKBURN: Yes. That's the little matter, your Honour, and the other matter is the national security aspect. I mean, I've just come into the matter, your Honour, and I can't speak - - -

HIS HONOUR: Let me ask Mr Yezerski about that. So I haven't seen the exhibits to Mr McKenzie's affidavit.

MR YEZERSKI: Yes.

HIS HONOUR: There was some ..... about those.

MR YEZERSKI: Yes.

HIS HONOUR: Is there national security information in there?

MR YEZERSKI: In large part no, your Honour. As your Honour probably appreciates, the whole – almost all of the appellant's interlocutory application to adduce further evidence on the appeal relates to an aspect of the case below that – in respect of which the respondents were unsuccessful and no appeal is taken in relation to his Honour's findings in relation to that. So – and really none of it touches the matters that are – or have been to date – the substance of the appeal. But, in any event, there are, at least in some of the exhibits to Mr McKenzie's affidavit, material that needs to be anonymised in accordance with existing orders, and there is some information that is, I think, strictly speaking, NSI information, because – and at least tangent – it's not – not that it's of critical relevance to this application, but it is in passing mentioned in the documents and therefore has to be dealt with consistently with the NSI Act. That's the difficulty, so - - -

HIS HONOUR: For example – I mean I just posit this as a hypothesis - - -

MR YEZERSKI: Yes.

HIS HONOUR: - - - but could it be, for example, that the name of the soldier that he is.

MR YEZERSKI: Yes.

HIS HONOUR: Is that the kind of problem - - -

MR YEZERSKI: Yes, exactly. Exactly.

HIS HONOUR: Right. Okay.

MR YEZERSKI: That's precisely the type of material that's in there.

HIS HONOUR: So if – if – if a copy of the exhibits were produced which, for example, either redacted – replaced soldiers' names with the names they've got in the rest of the proceeding - - -

MR YEZERSKI: Yes.

HIS HONOUR: - - - person 5, person 6, etcetera, or otherwise redacted it - - -

MR YEZERSKI: Yes.

HIS HONOUR: - - - that would work. Except, of course, Mr Blackburn, I imagine he can probably live with just having the numbers because everyone else does.

MR YEZERSKI: Yes.

HIS HONOUR: In fact, the numbers turn out to be easier to use than the names, ultimately.

MR YEZERSKI: Yes.

HIS HONOUR: But if there's any other redaction - - -

MR YEZERSKI: Yes.

HIS HONOUR: - - - he won't know what's being redacted.

MR YEZERSKI: He won't know what's being redacted. I also, your Honour, have been removed from the process, but can I perhaps seek some instructions and come back to your Honour when we return in relation to that?

HIS HONOUR: I mean, I can see Mr Blackburn, very responsibly, will want to see what it is, but he has not seen that.

MR YEZERSKI: Yes, of course.

HIS HONOUR: You and I and Mr Moses know that it's almost certainly of no interest - - -

MR YEZERSKI: Yes.

HIS HONOUR: - - - but that can't satisfy him. But the problem is getting him to the position where he's legitimately able to work out that what is redacted is of no interest to him is going to require the involvement of the government solicitor and - - -

MR YEZERSKI: That's right.

HIS HONOUR: - - - the whole - - -

MR YEZERSKI: And Mr Beaton actually gives some evidence about this. On the last occasion it was necessary to expand that group. It took about nine days. I say that without criticism of anyone, but it just – it's just a process that takes time.

HIS HONOUR: What happens if you got rid of the actual exhibit you got from Mr McKenzie?

MR YEZERSKI: Yes.

HIS HONOUR: So instead of it being a redacted exhibit, in fact the exhibit itself just didn't have that information in it, so you didn't try and – you anonymised the soldiers and redacted the national security information - - -

MR YEZERSKI: Yes.

HIS HONOUR: - - - and then that's the only thing you put in front of the court, so Mr Blackburn wouldn't get to see it - - -

MR YEZERSKI: Yes.

HIS HONOUR: - - - but I wouldn't get to see it either, and neither would Mr Moses.

MR MOSES: Well, I've seen it.

HIS HONOUR: I've seen it too, but - - -

MR MOSES: Can even see what you've seen, your Honour. .....

MR YEZERSKI: I - - -

HIS HONOUR: I'm just trying to stop us getting derailed by a non-issue. That's the - - -

MR YEZERSKI: I – I – no, I accept that your Honour. I mean, I would want to consider it. The concern I have is this. This application, as your Honour knows, turns on the proposition – which, of course, we reject – that Mr McKenzie had information of a very limited kind; that is, privileged and confidential information belonging to the appellant. Now, as your Honour has seen, Mr McKenzie says – he doesn't believe he ever had material of that kind, and to substantiate that, he gives some evidence about the types of information he did have, demonstrating that none of it was of that kind.

Now, the second part is what gives me pause in relation to your Honour's question, because it may be relevant to demonstrate that the information he did have was not of

the kind that is now the subject of this application, and to do that he probably needs to bring forward the information he did have. That's the difficulty, but if I can perhaps consider it, at least over the course of the morning, your Honour.

HIS HONOUR: Yes, well while mr Moses is using up his hour, maybe you can think about that.

MR YEZERSKI: Yes.

MR MOSES: I think my hour is being used up at the moment, your Honour. But just in relation to the suppression order issue concerning person 17, we will draft something for our friend's consideration to assist with that process to expedite it. In respect to the NSI matter, I think that's really a matter, as I said, that the new solicitors acting for Mr Levitan and Mr Bartlett should correspond with the AGS to see whether they can expedite that matter. It shouldn't take nine days; it's an administrative process. So basically they should see whether they can move quickly to deal with that if there is any issue in those exhibits that are set to be NSI related information so that there's no delay.

HIS HONOUR: How do I – how do I bring that to pass, that Mr Blackman and Mr Bender's instructing solicitors now start open a line of communication with the AGS with a view to getting them access to whatever they need to get access to.

MR MOSES: Well, to agree to any variation of the order - - -

HIS HONOUR: Yes.

MR MOSES: - - - so that they can act. As I said, it's rather ridiculous because those for whom they act have had access to all this information.

HIS HONOUR: Yes.

MR MOSES: So it's a rather silly thing for there to be any delay. And as I said, there's somebody here, I'm told, from the AGS. They really should announce their appearance, rather than remaining silent.

HIS HONOUR: Well, rather – they probably just saw the return of subpoena in the list and - - -

MR MOSES: Of course. But somebody - - -

HIS HONOUR: - - - probably thought this was a fairly tame - - -

MR MOSES: But somebody should indicate who is here, so at least they can be the subject of correspondence with the lawyers - - -

HIS HONOUR: Well, what I - - -

MR MOSES: - - - acting for those two individuals.

HIS HONOUR: What I might do is I might suggest that the AGS – when we meet again in about an hour's time, that the AGS might announce its appearance then, and we can take this topic up with them at that point.

MR MOSES: Yes, of course. Yes, your Honour.

HIS HONOUR: So Mr Blackburn, that has advanced things a little bit, but not a lot.

MR BLACKBURN: Yes, yes.

HIS HONOUR: But perhaps we will get some more progress in an hour.

MR BLACKBURN: Yes, yes.

HIS HONOUR: All right.

MR BLACKBURN: Yes, your Honour.

HIS HONOUR: So nothing more from you, Mr Blackburn. You're riding on Mr Blackburn's tailcoats, Mr Bender.

MR BENDER: I'm .....

HIS HONOUR: Yes.

MR YEZERSKI: I'm sorry, your Honour. One last formal matter. The application was filed last – my client's application was filed last night. We're yet to receive a stamped copy from the registry of that or the affidavit. I don't think that should hold things up, but I just raise it in case it creates some difficulty.

HIS HONOUR: Yes, okay. Well, I'm sure a file copy will turn up at some stage. Mr Moses, I'm assuming you're working off an unfiled copy. I've got an unfiled copy.

MR MOSES: No, I'm not taking that point. There are many other good points to take. Yes. I like to have good points. Yes, if it please the court.

HIS HONOUR: All right. Well, we will deal with your interlocutory application, even though it doesn't yet have a stamp on it, Mr Yezerski.

MR YEZERSKI: Thank you, your Honour.

HIS HONOUR: All right. Well, the court will adjourn until quarter past 11, unless Mr Moses contacts me beforehand to tell me he needs more time.

ADJOURNED **[10.13 am]**

RESUMED **[11.16 am]**

HIS HONOUR: Mr Yezerski.

MR YEZERSKI: Your Honour, before I commence, Ms Single for the Commonwealth wishes to address the NSI information question.

MS J. SINGLE SC: Your Honour, Single for the Minister administering the NSI Act. Your Honour, I apologise. I didn't realise I was going to be coming to court today. I understand, your Honour, that there has been a request for some further individuals to have access to the information. In the very brief time that we've had, it's unfortunately not a straightforward operation. The NSI orders don't contemplate this situation arising, so, for example, they don't fall within the definition of a party representative because party in itself is defined as the applicant and the respondent to the proceeding.

We are already starting to think of a potential workaround for the orders. In the meantime, until we figure out how we can get the orders to apply, order 89 of the NSI orders outlined the information that would be required for a party representative to be approved. So whilst they wouldn't fall within the definition of party representative, order 89 at least outlines the information that's required by the Commonwealth in order to have individuals approved under the NSI orders.

So what the Commonwealth would need is a request in writing outlining who it's proposed to have access to the information, what information it's proposed they have access to, and for what purpose the person's proposed to have access to the information, in addition to the specifics outlined in order 89, which includes full name, date of birth, previous names, a copy of their passport. We've already – I've already raised this very briefly. I understand those things can be obtained relatively quickly. Once the Commonwealth figures out how the NSI orders can apply and we receive that information, it can be done very quickly.

HIS HONOUR: Okay.

MS SINGLE: So long as there is no issue with the individual, if I can raise it that way, your Honour. I understand all applicants are citizens of Australia, so that does make it easier as well.

HIS HONOUR: So practically speaking, this application – sorry, the application to which this difficulty relates is going to happen next Tuesday.

MS SINGLE: Yes.

HIS HONOUR: Friday is a public holiday, today is Wednesday. We just have to do the best we can. In the meantime, Mr Blackburn and Mr Bender can work from redacted versions, which will take them a long way, I would think. Would it be useful to mention the matter in front of me again tomorrow morning?

MS SINGLE: Potentially – yes.

HIS HONOUR: I don't know – that might not be useful, but - - -

MS SINGLE: The first point is we've got to figure out how to get them in – within the orders to begin with, your Honour. We think we have an idea, but we've just got to work that through and then we get information. The other thing is if there's just a specific – like if there's specific evidence or information that it's needed to have access to, it may be that that evidence can be looked at to see whether or not classifications still need to be made. Matters have progressed a fair way - - -

HIS HONOUR: I mean, I think - - -

MS SINGLE: - - - since the beginning of this matter commenced.

HIS HONOUR: In terms of – I will just ask Mr Blackburn. In terms of – you're a long way behind the eight ball, but in terms of knowing the names of the soldiers, in the proceedings they've – apart from the closed court reasons, they've always been referred to by numbers.

MR BLACKBURN: Yes. Yes.

HIS HONOUR: And people are much more familiar with them - - -

MR BLACKBURN: Yes.

HIS HONOUR: - - - by their numbers than they are by their actual name. So I don't want to talk you out of seeking the names.

MR BLACKBURN: No. No.

HIS HONOUR: But - - -

MR BLACKBURN: I understand what your Honour is saying.

HIS HONOUR: So that might be one thing. I don't know what the other stuff is.

MS SINGLE: No. So that's why if we are informed as to what the information is, it may be able to be an even faster situation.

HIS HONOUR: So I think Mr Yezerski probably the fastest way to work out the answer to that question because he can look at it.

MS SINGLE: Yes.

MR BENDER: Can I raise one matter. If your Honour doesn't set aside the ..... news documents issued to my client, it will be necessary for my instructing solicitors to review any documents that were produced pursuant to it, obviously. There's at least a substantial likelihood that those documents which from Mr ..... affidavit ..... may have NSI information in them. So it's not just a question of delaying the hearing of the application on Tuesday, it's also a question of the way in production pursuant to the subpoena to produce documents for Mr Levitan and I assume Mr Bartlett, if your Honour doesn't set them aside.

MS SINGLE: We will do it as quickly as we can, but until at least a contemplation of the orders, we receive the information under the orders, it just can't occur - - -

HIS HONOUR: Yes.

MS SINGLE: - - - at all. So if the process as outlined in section – in order 89 is at least progressed, then from the Commonwealth's perspective it can happen quite quickly, your Honour. .

HIS HONOUR: Sorry. Mr Blackburn and Mr Bender, have you any idea how long it would take for you to comply with the process in order 89?

MR BLACKBURN: Well, I'm sure we could probably both comply with it very quickly if it's just, you know, full details, the passport, all the rest of it, and then it's over to the Commonwealth. I mean, that could be done today.

HIS HONOUR: Yes. Well, as soon as it possibly can, I think, would be the best thing to do. So - - -

MR BLACKBURN: Yes. Yes. Well, as soon as we – I will get on to it as soon as we get out of court, your Honour.

HIS HONOUR: All right. Okay.

MS SINGLE: And we will start looking at the actual orders to see how they can work, your Honour.

HIS HONOUR: Yes. Thank you, Ms Single.

MS SINGLE: Does your need anything else from me or can I be excused?

HIS HONOUR: You can be excused.

MR MOSES: I might just - - -

MS SINGLE: If anything else arises, I can be called back in.

HIS HONOUR: Summoned back.

MR MOSES: I might just raise one issue while my friend is here, which my friend no doubt is alive to and might be the issue that my friend is dealing with. In the proceedings before Besanko J, there were a number of different lawyers who were retained for different witnesses who came along to give evidence, and there were variations made. That might be - - -

MS SINGLE: We've already looked at - - -

MR MOSES: - - - the issue that my friend is looking at.

MS SINGLE: No. So that's the definition of sensitive witness representative, which in itself has – the definition of a sensitive witness potentially has some problems. So we have already started looking at that issue, which is why it's more complicated than it might be at first glance because of definitions within definitions, your Honour.

HIS HONOUR: Well, you've heard that, Mr Moses. Ms Single, you can be excused, and - - -

MS SINGLE: Thank you.

HIS HONOUR: I think, Mr Bender and Mr Blackburn, if you want to be excused, you can be excused, too, because your interests in relation to the document issue are covered by Mr Yezerski. Matter for you.

MS SINGLE: Thank you, your Honour.

HIS HONOUR: Mr Yezerski.

MR YEZERSKI: Thank you, your Honour. So, your Honour, I move on the respondents' interlocutory application filed yesterday to set aside a notice to produce to the second respondent, Mr McKenzie, and six subpoenas to produce documents. Those subpoenas are issued to Mr Bartlett, Mr Levitan, Ms Roberts, the ex-wife of the appellant, Ms Scott, who is a friend of Ms Roberts, person 17 and the ABC. In support of that application, I read the affidavit of my instructing solicitor, James Charles Beaton, B-e-a-t-o-n, sworn 22 April 2025, and I tender its exhibit JCB-1.

HIS HONOUR: Yes, Mr Moses. Any objection to Mr Beaton's evidence?

MR MOSES: Your Honour, there are no objections. There are some submissions that we will put forward in terms of questions of weight and relevance of some of the issues, but I will deal with that in submissions. We have given consideration as to whether we would seek leave to require the deponent for cross-examination. We won't be making that application, but there are a number of submissions that we will make concerning his affidavit, that we don't think it can be said that we should have put those propositions to him, because they're self-evident as to matters that should have been addressed by him which haven't been.

HIS HONOUR: Well, you can't be criticised for not putting something to the witness if I've indicated that I'm unlikely to grant you leave.

MR MOSES: Thank you, your Honour.

HIS HONOUR: All right. The affidavit of Mr Beaton dated 22 April 2025 is read without objection and the exhibit of that affidavit, JCB1, will be exhibit JCB1 on the application. Yes.

EXHIBIT #JCB1 EXHIBIT TO THE AFF OF JAMES CHARLES BEATON DATED 22/04/2025

MR YEZERSKI: Please the court. Your Honour, can I also inquire whether your Honour has access to the appellant's interlocutory application seeking to adduce new evidence on appeal - - -

HIS HONOUR: I do.

MR YEZERSKI: - - - and the affidavit of Ms Allen sworn in support of her on 27 May 2025.

HIS HONOUR: I do. Yes.

MR YEZERSKI: I don't think I need to tender any part of it formally, but I will refer to part of it in the course of my submissions.

HIS HONOUR: Okay. I think we can proceed on that basis because, effectively, this is an interlocutory application inside that interlocutory application, so that interlocutory application and the affidavit upon which it rests form the substructure of your application.

MR YEZERSKI: That was my supposition, your Honour.

HIS HONOUR: You are content to proceed on that basis, Mr Moses?

MR MOSES: Yes, your Honour.

MR YEZERSKI: Your Honour, can I indicate by way of overview that the respondents apply to set aside the notice to produce and subpoenas on two bases. The first is that, as presently framed, the notice to produce and subpoenas capture documents of no apparent relevance having regard to the appellant's interlocutory application to adduce further evidence on appeal and the appellant's proposed amended notice of appeal. Many of the categories serve no legitimate forensic purpose. Others are overly broad insofar as they would capture large volumes of documents of no apparent relevance. The second basis is that, with respect to the notice to produce and the subpoenas to Mr Bartlett and Mr Levitan, compliance with them would be unduly burdensome in circumstances where the matter is listed for hearing before the Full Court on Thursday and Friday next week.

In my oral submissions, I will first address the terms of the appellants interlocutory application and the proposed amended notice of appeal, and that is because those documents, together with the evidence – the affidavit evidence, that define the issues raised on the appellant's application against which questions of apparent relevance must be assessed. I will second deal with the notice to produce and, in the course of doing so, deal with the subpoena to the ABC. I will third deal with the subpoenas to Mr Bartlett and Mr Levitan. I will fourth deal with the subpoenas to Ms Scott and Ms Roberts and, finally, I will deal with the affidavit to person 17.

HIS HONOUR: Subpoena.

MR YEZERSKI: Sorry I said affidavit I meant subpoena. I begin with the question of apparent relevance and, in that context, start with the necessary starting point being the appellant's interlocutory application filed 27 May 2025 and the proposed amended notice of appeal, and if I could ask your Honour to turn first to the appellant's interlocutory application.

HIS HONOUR: Yes, I've got that.

MR YEZERSKI: Thank you. As your Honour will see by paragraph 2 of the interlocutory application, the appellant seeks leave to file an amended notice of appeal in the form attached thereto, and that amended notice of appeal commences on page 3. The relevant amendment is on page 5, and by that amendment, or proposed amendment, the appellant seeks to add a new ground of appeal being ground 17. The contention in ground 17 is that there has been a miscarriage of justice and a denial of a fair trial to the appellant in the proceedings below, and I emphasise these words:

> *...by reason of the second respondent's misconduct.*

Now pausing there, ground 17 only alleges misconduct by the second respondent. It does not allege misconduct by any other person. Your Honour is familiar with how the notice of appeal works. There are particulars to each ground of appeal. They

commence on – in the annexure on page 7, and the relevant paragraphs in respect of proposed ground 17 commence on page 17 with paragraph 35 of the annexure. Your Honour sees paragraph 35 asserts that the second respondent, Mr McKenzie, engaged in wilful misconduct, by improperly and awfully obtaining and retaining information concerning the appellant's legal strategy concerning the trial that was confidential and privileged to the appellant.

Can I emphasise four aspects of that particular. The first is that it again only alleges misconduct by the second respondent, nobody else. Second, it would require, if leave to amend is granted, the appellant to prove that the relevant information was obtained improperly and unlawfully by the second respondent. Third, the appellant's proposed case is that the asserted misconduct by the second respondent was wilful, and that contention can only be understood as an allegation that the second respondent knowingly and deliberately obtained and retained information which he knew to be privileged.

Fourth, the proposed ground of appeal would require the appellant to prove that the information obtained and retained by the second respondent had a specific character, being that it concerned the appellant's confidential and privileged legal strategy concerning the trial. That last point is significant because what is of apparent relevance to the issue raised by the appellant's interlocutory application and proposed amended notice of appeal are documents which could reasonably expected to shed light on whether Mr McKenzie had access to information that makes the description of the appellant's confidential and privileged legal strategy. It's not to the point that Mr Mackenzie may have received other information relating to the appellant, that does not meet that description. Turning now to paragraph 37 of - - -

HIS HONOUR: So the two elements are what? Confidential and privileged?

MR YEZERSKI: Confidential and privileged. Turning then to paragraph 37 of the proposed amended notice of appeal, the chapeau introduces the asserted counterfactual. It states:

> *There is at least a real possibility that had, the second respondent not engaged in such misconduct, the result of the trial would have been different.*

The chapeau to paragraph 37 hinges off the allegation that the second respondent engaged in misconduct, and in context can only be understood as a reference back to paragraph 35, and again that's because no misconduct is alleged against any other person. The same is true of the chapeau in paragraph 37. Subparagraph 8 of paragraph 37 again refers to the alleged misconduct by the second respondent and no one else.

The language in subparagraphs (b) and (c) is different and broader insofar as it refers to the respondent's improper access to the appellant's confidential and privileged – sorry and legally privileged – information, but that can only sensibly be read as a reference back to information said to have been improperly and unlawfully obtained

by the second respondent, having regards to the terms of ground 17, which is what is being particularised, and paragraphs 35 and the chapeau to paragraph 37.

So, in other words, the contention in subparagraphs (b) and (c) is that the respondents had improper access to the appellant's confidential and privileged information, but the mechanism of that improper access was through the actions of the second respondent in allegedly improperly and unlawfully obtaining and retaining that information. So, in short, the theory is the second respondent was the relevant conduit.

The appellant does not contend that the respondents obtained the appellant's privileged and confidential legal strategy otherwise than through the second defendant. There's no suggestion that the information was obtained through communications to which Mr McKenzie was not a party. There is no suggestion, for example, that such information was obtained through communications between Mr Bartlett or Mr Levitan on the one hand and Ms Roberts or Ms Scott on the other. For that reason, documents recording communications of that kind would not, without more, have any apparent relevance to the issues raised by ground 17 of the proposed amended notice of appeal.

HIS HONOUR: So you think that this submission is that it narrows the focus of that which is – leaving aside whether it can actually be subpoenaed – but could conceivably be subpoenaed to communications involving the second respondent and not communications between Ms Roberts and person 17 and the other people.

MR YEZERSKI: That is so. Of course if – and I don't mean to suggest that if Mr Mackenzie was there and other people were there, the question might be different – but certainly in circumstances where the communications do not involve Mr Mackenzie, that is the submission. The other aspect of the appellant's interlocutory application that's relevant to the assessment of apparent relevance, of course, is the nature of the further evidence that the appellant seeks to rely on on the appeal, and the affidavit evidence that he relies on, and that evidence is the affidavit of Ms Allen, his instructing – the appellant's solicitor, sorry, sworn 27 March 2025, and its exhibit.

Now, the evidence in Ms Allen's affidavit falls broadly into two categories. The first is evidence of a conversation between Mr McKenzie and person 17, that is the subject of the audio recording, and the evidence is that that conversation occurred around March April 2021. The second category of evidence is the evidence filed in separate proceedings brought previously by the appellant against Ms Roberts, his ex-wife, in 2021, which were determined by Bromwich J.

And in those proceedings, the appellant alleged that Ms Roberts had obtained his privileged communications by accessing a company email account to which had access. In those proceedings, the appellant swore an affidavit dated 10 June 2021 in which he deposed to a belief that Ms Roberts had accessed his email account in April or May 2021. Can I just show you your Honour that briefly, because that affidavit of

the appellant is one of the affidavits exhibited to Ms Allen's affidavit. So it's in exhibit MHA1.

The relevant affidavit commences on page 11, and I want to go to three portions of it. In paragraph 22, your Honour sees – in – paragraph 22 has a number of paragraphs to it, somewhat confusingly, but the last paragraph of paragraph 22, immediately before paragraph 23, the appellant deposes to an observation that he made on or about 20 April 2021, and then says that based on that observation it is his belief that Ms Roberts had access to his account at least by that time.

Then the appellant makes a further observation based on his access to that account on 20 April 2021 in paragraph 24, and a similar observation in paragraph 26 that, upon his review of the account on 30 May 2021, he observed certain things. And all of that feeds into the suspicion that he deposed to, or the belief that he deposed to, in paragraph 22. The reason for emphasising these matters, your Honour, is that what they demonstrate is that the alleged improper access of which the appellant complains is something that, even on the appellant's case and evidence, must have occurred no later than the end of May 2021. And the significance of that is that documents after that date can have no apparent relevance to the appellant's interlocutory application and proposed commend his notice of appeal in this court.

HIS HONOUR: Can you just step me through that?

MR YEZERSKI: Yes. So perhaps I will go back to the audio recording. The audio recording is March or April 2021. So whatever is being referred to in the context of that conversation has already occurred by March or April 2021. So that's one aspect of the application, and that date's apparent relevance no later than the end of April, say 2021. The other aspect of the appellant's application, as we understand it, is that he wishes to rely on the material that was before Bromwich J, which deposed to a concern that his emails were being accessed by Ms Roberts at some time before April or, at the very latest, given paragraph 26 of the 10 June affidavit, 30 May 2021. He says by that time he's accessing his email account, and he's observing that others have, on his view, others must have accessed it and that founds the belief that he deposes to in paragraph 22.

HIS HONOUR: And so your contention is therefore nothing after 30 May 2021 matters?

MR YEZERSKI: Nothing after 30 May 2021 matters because whatever the appellant asserts on this application, on the present application, must have occurred – must have occurred, even on his account, by the end of May 2021.

HIS HONOUR: How do we know it stops at the end of May 2021?

MR YEZERSKI: Well, the starting point has to be the evidence that he's relying on. The evidence he's relying on doesn't provide a basis to believe that it continued after. That's proposition 1. Proposition 2 is, insofar as what the appellant is

contending, is that the issue concerned access to his email accounts. It's not reasonable, in my submission, to make any assumption that having formed the suspicion that he deposes to in paragraph 22 of the 10 June affidavit, that he continued to use that account to correspond with his lawyers, and that privileged information was being included in emails from that account thereafter. That would not be a that would not be sensible conduct for a start, and it wouldn't be a safe inference. So that's why we say that issues of apparent relevance on this application must end no later than 31 May 2021. Can I then turn to the notice to produce. Does your Honour have copies of it - - -

HIS HONOUR: Yes, I do.

MR YEZERSKI: - - - or would it be convenient to refer to the exhibit copy?

HIS HONOUR: I've got several copies. Thank you. Actually, not the notice to produce.

MR YEZERSKI: The notice to produce to Mr McKenzie.

HIS HONOUR: Yes. I've got copies of the subpoenas, but not a freestanding copy of the notice to produce. So where is that in the - - -

MR YEZERSKI: So it is in exhibit JCB1, and it commences at page 4.

HIS HONOUR: Thank you. Yes, I've got that. Yes.

MR YEZERSKI: So if I can start with category 1, your Honour. The dispute in relation to category 1 is limited. It's limited to the date range point that I've just made. The appellant seeks a cut-off of 27 July 2022, which is the date of the end of the trial. We say that is too long, both because documents after 31 May 2021 have no apparent relevance, but also because the burden of extending the category by over a year is significant, particularly in circumstances where the hearing of the appeal is, relevantly, Thursday and Friday next week. Then, in relation to category 2, there are three objections. The first is the same date range objection. That's category 1. I'm sorry, your Honour, is it – does your Honour wish me to go through them - - -

HIS HONOUR: That would be - - -

MR YEZERSKI: - - - as we go, or would you like to deal with them - - -

HIS HONOUR: Yes. That would be useful.

MR YEZERSKI: Yes. Okay. So then, category 2, there are three objections. The first is the date range objection. The second is that the category is not sufficiently tailored to documents of apparent relevance. Again, the question raised by ground 17 of the proposed amended notice of appeal is whether Mr McKenzie obtained and retained information of a specific kind, being confidential and privileged information

concerning the appellant's legal strategy in relation to trial, and, if he did, how such information was used.

If Mr McKenzie obtained such information from Ms Scott or Ms Roberts, which the respondents deny, communications between him and his solicitors, MinterEllison in relation to that specific type of information – that is information concerning the confidential and privileged legal strategy of the appellant – would have appellant relevance having regard to the proposed amended notice of appeal. But this category, category 2, is wider.

It's not confined to communications relating to the appellant's confidential and privileged legal strategy, nor is it confined in terms that provide any useful proxy for identifying documents that might be in relation to such information. Instead, category 2 of the notice produce seeks communications between Mr Mackenzie and MinterEllison relating to any information of any kind obtained from Ms Scott or Ms Roberts.

HIS HONOUR: That's the same as – first paragraph. You don't raise this point in relation to the first paragraph.

MR YEZERSKI: Well, no, except that there are additional problems because what is then captured in 2 by the words "in relation to that information or said to be derived from that information" is an expansion to, then, all subsequent discussions, having regard to the information itself. So we understand category 1, and particularly subject to the date range, it would be limited. Category 2 is more expansive because we then face the difficulty that, by reason of the words "in relation to information or derived from", there's an expansion.

So what would be captured, unlike category 1, is not just communications between Ms Scott or Ms Roberts and Mr McKenzie that convey the information, and not just – as we will come to in category 4 – information – communications from Mr McKenzie to MinterEllison where he forwards on or passes on that information. What is captured is secondary communications about that information and derivative of that information. And we say that presents a real problem.

It presents a problem of apparent relevance, but it also creates a sizeable burden problem, because one of the things that any reviewer would have to determine is whether, in an exchange between Mr McKenzie and any employee or partner of MinterEllison, the information being discussed – though not referring to Ms Scott or Ms Roberts by name – is nevertheless information obtained by them or derived from them, and that's pf particular difficulty because Mr Beeton deposes at paragraph 35(f) of his affidavit that the lawyers that will be working on this were not involved in the proceedings at first instance.

Now, that burden is particularly significant given the impending hearing date. Mr Beaton gives evidence as to MinterEllison's preliminary estimates of the number of documents that would need to be reviewed. He's cautious in that. They are

preliminary estimates, and they're done on the basis of keyword searches, but he explains that based on those preliminary estimates there are approximately 1360 documents that would need to be reviewed based on preliminary keyword searches, and that number does not include an additional 2684 text and WhatsApp messages that would need to be manually reviewed because they're not necessarily keyword searchable. That's paragraph 27 of Mr Beaton's affidavit.

In addition to the ordinary timing difficulties that would arise from that sort of volume, your Honour knows that the material can only be looked at by people who can review the NSI information, and so – and that group cannot be expanded quickly. That's paragraph 35(a) of Mr Beaton's affidavit and, in those circumstances, the review will be conducted by five lawyers MinterEllison, which is paragraph 35(b) of Mr Beaton's affidavit.

Now, what Mr Beaton has done in recognising that there overlap between categories 1, 2 and – 1, 2, 3 and 4 of the notice to produce is to provide an estimate based on those preliminary counts as to the overall time it would take to comply with categories 1 to 4 of the notice to produce as presently framed. That estimate is in paragraph 37 of his affidavit, your Honour, and his estimate is that it would take nine business days to do so in circumstances where the matter is five business days away from hearing.

The last point in relation to category 2, your Honour is that, subject to a point about the date and the date range, the respondents do not take objection to category 4, and the same as your Honour knows is true of category 1. And so there is a real question as to the utility of category 2, in circumstances where, subject to questions of date range, categories 1 and 4 are not opposed.

Can I then come to category 3, your Honour. There are four issues with category 3. The first is the date range problem. The second is that the category is overbroad and would capture a large volume of communications of no apparent relevance, because they're not confined to the – to communications relating to the appellant's confidential and privileged legal strategy. The inclusion of person 17 in category 3 is also unjustified because there's no allegation that person 17 had any privileged information belonging to the appellant or that she conveyed that information to the respondents.

The inclusion, we think, of person 17 in this category is odd and unexplained, and it's not justified by the appellant's interlocutory application. It's of course conceivable that communications with person 17 might be of sufficient relevance if they bear, for example, on the meaning of what is being said in the audio recording, but there has been no attempt in the drafting of category 3 to limit communications with person 17 to documents of apparent relevance, given the way the application is framed.

The third difficulty with category 3 is that it extends to communications between persons acting on your behalf – that is on Mr McKenzie's behalf – and any of the

three persons listed – that is Ms Roberts, Ms Scott, and person 17 – over a period of two years. Now, again, I make the point I made earlier. There's no allegation that the conduit of this information was anyone other than Mr McKenzie. So conversations, text messages, communications between persons acting on behalf of Mr McKenzie and any of Ms Roberts, Ms Scott and Person 17 simply do not arise as having any apparent relevance given the way the appellant puts its case in the interlocutory application of the proposed amended notice of appeal.

The fourth issue is again one of burden and oppression, and that's particularly so in circumstances where Ms Roberts and Person 17 were witnesses for the respondents at trial, and an outline of evidence was served by the respondents for Ms Scott, although Ms Scott was not ultimately called as a witness. So it follows that a large number of communications are likely to exist between Minter-Ellison and Ms Scott, Ms Roberts and Person 17, given that they were witnesses or potential witnesses, that almost all, or perhaps all – at least almost all of those communications are likely, at least, covered by litigation privilege. And again that creates a significant review burden, particularly given the short time frame.

Mr Beaton's evidence in relation to this category is that the initial keyword searches have identified 1500, approximately, documents responsive, or potentially responsive to the category that would need to be reviewed and that again excludes text and WhatsApp messages. That's Mr Beaton's affidavit at paragraph 31. The last point in relation to category 3 is the same as the last point in relation to category 2, which is, given the overlap with categories 1 and 4 which, subject to date range, we take no issue with. There's no additional utility in category 3 and any such conceivable utility is outweighed by the burden. The next category is category 4. As I've already said, the only issue there is one of date range. Although it's not expressed in the notice to produce, the appellant has proposed a period of 20 August 2020 – sorry, 1 August 2020 to the same date of 27 July 2022. As in the other categories, we press a date limitation at the back end of 31 May 2021, but otherwise don't object to that category. Category 5 is not pressed by the appellants, as we understand it. That's confirmed in a letter from the appellants' solicitor to Minter Ellison dated 21 April 2025. I don't need to go through it but for your one is referenced it is at JCB1 at page 139.

Category 6 seeks all letters, emails, text messages, WhatsApp messages – sorry, text messages, WhatsApp or single messages or notes of conversations between Mr McKenzie and any person acting on his behalf, and Linton Besser or any other producer or researcher at the ABCs program, Media Watch, in relation to Person 17 or the audio recording from 21 March 2025 to date. Now, that category has no apparent relevance to the issues raised by the appellant's interlocutory application and the proposed amended notice of appeal. In the language of the authorities, such documents could not reasonably be expected to throw light on any of the issues. It's simply a fishing expedition and a curious one. The appellant's solicitor has sought to explain the relevance of the category, and can I show your Honour that explanation. It is in JCB1 commencing at page 147. I'm sorry. It commences at 137, your Honour, but the relevant portion is – it commences at page 139. Your Honour should

see category 6 at the bottom of the page, and if I could invite your Honour to read the paragraphs under category 6, under the heading Category 6, please.

HIS HONOUR: Yes. Yes, I've read that.

MR YEZERSKI: Thank you, your Honour. We say that explanation falls far short of establishing that the documents could reasonably be expected to shed light on the issues. Indeed, the justification appears to be that the appellants are hoping to fish for some different case relating to a potential breach of suppression orders or something of that kind, and that is not a legitimate forensic purpose. While I'm dealing with this category, can I deal with the ABC subpoena. Your Honour, if your Honour turns that up, it seeks a single category of documents which is in substantially the same terms as category 6 of the notice to produce. Does your Honour have that?

HIS HONOUR: Yes.

MR YEZERSKI: And we say, for precisely the same reasons, that subpoena is – serves no legitimate forensic purpose and is an abuse of process and should be set aside.

HIS HONOUR: Do each of the subpoenas have a, kind of, structural relationship to the notice to produce?

MR YEZERSKI: They – they do. And I indicated this morning I will speed up as I go, because I do my best not to repeat myself. But, conveniently here, there's perfect overlap, as it were. So if category 6 of the notice to produce is bad, the whole ABC subpoena is bad and should go. Can I then return to the notice to produce, which is at page 4 of the exhibit, and deal together with categories 7, 8, 9 and 10. Now, the common feature of each of these categories is the date range, being the date range of 21 March 2025 to date, and obviously that postdates by several years the events the subject of the appellant's interlocutory application.

Categories 7 and 8 are in identical terms, save that one relates to communications between Mr McKenzie and Mr Bartlett and that the other relates to communication between Mr McKenzie and Mr Levitan. Categories 9 and 10 are in identical terms, save that category 9 relates to communications with Ms Roberts and category 10 relates to communications with Ms Scott. If I could ask your Honour to turn back to the letter from the appellant's solicitor that commences at 137 of the exhibit, and show your Honour the justification for this category. It appears at page 140 of the exhibit. Your Honour should see about a third of the way down the page - - -

HIS HONOUR: Yes.

MR YEZERSKI: - - - the heading Category 7 to 10. If I could invite your Honour to read that, please.

HIS HONOUR: Okay. Read that.

MR YEZERSKI: Thank you, your Honour. The most that is set in support of these categories is that the documents caught may be of relevance to Mr Mackenzie's credit, and of course that is a matter of pure speculation. A subpoena that, on a purely speculative basis, seeks documents in the mere hope that they might impugn a witness's credibility, and without any knowledge of whether such documents exist or what they might say, is not one that has a legitimate forensic purpose, and that proposition is supported by authority. Your Honour, we've given your Honour a reference in paragraph 10 of our written submissions to the decision in Fried, F-r-i-e-d, v National Australia Bank Limited [2000] 175 ALR 194, the decision of Weinberg J, at paragraph 29 to that effect. I have a copy if it would assist, your Honour.

HIS HONOUR: No, it's fine. Thank you.

MR YEZERSKI: So, your Honour, that completes the notice to produce. Again, subject to your Honour's convenience, I can continue and deal with the MinterEllison subpoenas.

HIS HONOUR: Yes.

MR YEZERSKI: So the MinterEllison subpoenas, those are the subpoenas to Mr Bartlett and Mr Levitan. They're relevantly identical, and so I can deal with them by reference to Mr Bartlett's subpoena. As to category 1, we only object to the date range on the basis that I've already explained. So you can date – an end date of 31 May 2021. As to category 2, we object to it on substantially the same basis as category 2 of the notice to produce, and it ought be governed by the same ruling as your Honour ultimately makes in relation to category 2 of the notice to produce. It is in substantially the same form. It doesn't use the words "derived from", but it does use the words "in relation to information obtained". That takes me, your Honour, to category 3. Category 3 of the MinterEllison subpoenas raise similar issues to category 3 of the notice to produce, but we say the objections to this category in the MinterEllison subpoenas is even more powerful. The category 3 would capture communications between Mr Bartlett and Mr Levitan on the one hand, and any of Ms Roberts, Ms Scott and Person 17.

As to communications between Mr Bartlett and Mr Levitan and either Ms Roberts or Ms Scott, those documents have no apparent relevance because the appellant does not contend that any of the appellant's confidential and privileged information was conveyed by Ms Roberts or Ms Scott to Mr Bartlett or Mr Levitan directly or in any way other than through the second respondent. It follows that paragraph 3(a) and 3(b) of the subpoena serves no legitimate forensic purpose. Furthermore, in relation to category 3(c), there is again no allegation that Person 17 conveyed any privilege information belonging to the appellant to anyone, nor does any aspect of the appellant's application involve or allege that Mr Bartlett or Mr Levitan – Mr Levitan's dealings with Person 17 raised any concern of any kind whatsoever. Mr

Bartlett and Mr Levitan's dealings with Person 17 simply do not arise on the application, on the evidence. They're just wholly irrelevant.

I don't need to go back to it, but in Ms Allen's 21 April 2025 letter, Ms Allen seeks to defend this category by observing that the audio recording is a conversation with Person 17. That is true, of course, but there's no suggestion Mr Bartlett or Mr Levitan were involved in that conversation or were participants in that conversation, and there is no issue in respect of their interactions or dealings with Person 17 at any time. There's then a further issue of burden. Again, Ms Roberts and person 17 were witnesses and Ms Scott was a potential witness for whom an outline of evidence was served, and so the same significant issue of likely privilege and the associated burden arises, in relation to category 3 of the ME subpoenas. Category 4 – in – I withdraw that. In relation to category 4, your Honour, again the only issue is one date range, or we press for the period to end at 31 May 2021.

I should, however, observe that there's a difficulty in the drafting, or at least an ambiguity in the drafting, of this category. As we read it, a document would only be caught if it was a note of a meeting attended by Ms Roberts or Ms Scott on the one hand, and on the other, each of Mr McKenzie, at least one employee or partner of MinterEllison, and a member of the respondents counsel team. So we understand that a meeting without Mr McKenzie present is not captured. We understand, similarly, that a meeting where there was no counsel present would not be captured. I just want to make that clear, because if this paragraph survives, I wanted to avoid later debates about compliance with category 4 because that's as we understand it.

Category 5, again, as we understand it, not pressed by the appellant, and so I don't need to address that. The relevant statement from the appellant's solicitor is it JCB1 page 141. And then paragraphs 6 to 8 serve no legitimate purpose, and are an abuse of process for substantially the same reasons as category 7 to 10 of the notice to produce, and the ruling should be the same.

HIS HONOUR: Yes.

MR YEZERSKI: Can I next deal with the subpoenas to Ms Scott and Ms Roberts. And as I said at the outset, in circumstances where Mr Moses has foreshadowed a possible challenge to compliance with Ms Scott's subpoena, we do press for that subpoena to be set aside along with the subpoena to Ms Roberts. Again, they're relevantly identical, so I can deal with them by reference to the subpoena to Ms Roberts. As to category 1, there's the same date range issue but there are more fundamental issues. The more fundamental issue in relation to this subpoena is that it overlaps substantially with earlier subpoenas issued by the appellant to Ms Roberts in these proceedings, and that is most conveniently demonstrated by reference to a letter my instructing solicitors sent the appellant's solicitors on 21 April 2025. Could I ask your Honour to turn to that letter. It's at page 129 of exhibit JCB1 on the application.

HIS HONOUR: Yes. I have that.

MR YEZERSKI: And on page 134 in paragraph 46 it's observed that the categories of the subpoenas to Ms Scott and Ms Roberts are substantially similar to, or have substantial overlap with, the following subpoenas issued by your client in these proceedings, or the proceedings at first instance, and the subpoenas are identified in (a), (b) and (c), and then in paragraph 47 it's noted the substantial similarities and overlaps in the categories are set out in the table in the annexure.

The annexure starts on page 135, and just dealing with Ms Roberts: first, on the left-hand side, is the present subpoena, and on the right-hand side is an earlier subpoena issued by the respondent to Ms Roberts and complied with on 20 May 2021. The way to read it, obviously, your Honour, is across the row. So, category 1 of the present subpoena overlaps substantially with categories 3 and 4 of the 20 May 2021 subpoena, category 2 of the present subpoena overlaps substantially with category 1 and 2 of the 20 May 2021 subpoena, and category 3 of the current subpoena overlaps substantially with category 3 and 4 of the May 2021 subpoena.

So we do say it's an abuse of process to subpoena the same recipient again for documents that have been the subject of previous subpoenas. Those subpoenas have been complied with and there has been no challenge to compliance. The same is true in relation to Ms Scott's subpoena, but I don't need to work through the table. Returning then to the categories of the subpoenas to Ms Scott and Ms Roberts. I can – category – I think I've said what I need to say about category 2, both as to date range and duplication given the previous subpoenas. The same is true of category 3. Category 4 is objectionable on the same basis as category 7 to 10 of the notice of produce.

HIS HONOUR: Okay.

MR YEZERSKI: Can I then come to the subpoenaed person 17, which is the last of the subpoenas. As to category 1, there are three objections. The first is that it is a relevance objection. Again, it's important to recall who person 17 is, and perhaps more importantly for present purposes, who she is not. There's, again, no allegation that person 17 conveyed any allegedly privileged or confidential information relating to the appellant to Mr McKenzie or anyone else. Person 17 is simply a person who is the other participant in the conversation that the appellant relies on, on his interlocutory application. Person 17 and her communications with Mr McKenzie could only be relevant to the application insofar as they bear upon an understanding of what is occurring in the audio recording. That there's no warrant for expanding the category to all communications between Mr McKenzie unconfined by the subject matter of those dealings. There's no attempt to limit communications relating to anything that might be described as the appellant's confidential privilege legal strategy. The limitation imposed by the words "in relation to the appellant" is of no real substance because, of course, the only reason that Person 17 and Mr McKenzie were likely communicating this in relation to the appellant, so those aren't really words of limitation. So we say the category is far too broad. It would cover numerous communications of no apparent relevance.

Next, the category extends to communication between Mr McKenzie and any person acting on behalf of Person 17. Again, there's no suggestion in any of the materials that communications of that kind have any apparent relevance to any issue whatsoever. Indeed, there's nothing to suggest that Mr McKenzie had dealings with any person acting on behalf of Person 17, and there's then the same date objection, particularly in circumstances where, so far as Person 17 is relevant to the appellant's application, it can only be by reason of the audio recording which occurs in March or April 2021, so proceeding after that date just can't be relevant. Then I can deal with categories 2 and 3 together, and your Honour will anticipate what I say which is that they're governed by categories 7 to 10 of the notice to produce. It's the same objection. So your Honour, for those reasons – I've moved faster than I anticipated – for those reasons we say, as currently framed, each of the categories of the notices to produce and subpoenas are currently too broad. Many of them can't be salvaged particularly given they serve no legitimate forensic purpose. Others we say could be salvaged by limiting the date range, and we've proposed that, but that proposal has not been accepted.

HIS HONOUR: In terms of the salvage process, let's assume that I agree with you about some of this.

MR YEZERSKI: Yes.

HIS HONOUR: And I said, well, this subpoena needs to be set aside because the date range is too wide. In an ordinary case, there would be a regrouping and the issue of a fresh subpoena with a new date range. I'm just wondering, do you have any – you don't have to answer this now – but do you have any views about how we might cut out some steps in that process?

MR YEZERSKI: Yes, your Honour. Absolutely, and we anticipated it. What we envisage is that either by your Honour providing indications or rulings, we could either do the blue pencil task in real time or, given your Honour's indications, we would go off and sensibly act in accordance with them, or hand up short minutes which – I mean, the subpoenas. I mean, if it was useful to your Honour, I think over luncheon adjournment, we could provide markups of what we would propose but - - -

HIS HONOUR: It might be premature because - - -

MR YEZERSKI: It might be premature, but certainly, no one is seeking to add steps to the process. We would proceed immediately based on your Honour's indications and formalise them in whatever efficient ways is the most convenient to the parties and the court. Can I finally, in relation to the subpoenas, your Honour, just indicate this while I'm on my feet, if parts of the subpoenas to Person 17, Ms Scott and Ms Roberts survive, we would seek first access to any material produced in answer to those subpoenas in circumstances where those three individuals were either witnesses or potential witnesses for the respondents, and given Mr Moses' indication this morning, I don't anticipate that's opposed, but we do seek first access.

And it's a bit hard at the moment to say how long first access would need to last, because we don't know what if any information would be produced, so it can't be particularly helpful, but it may take a bit of time, particularly, for example, depending on the types of files that were produced. But we would obviously move as quickly as we could.

The last point, your Honour, just – the present application of course doesn't concern the subpoenas to appear, and perhaps I don't need to say anything further about them today other this. In the applications for leave to issue the subpoenas to appear, the appellant foreshadowed a willingness to provide outlines of the evidence anticipated to be led from those witnesses. I'm just bearing in mind the hearing on Tuesday next week, and then the matter is in court for alternative determination on 1 and 2 May. It may be appropriate for any such outlines to be forthcoming as soon as possible, even in circumstances where the status of the subpoenas is going to be determined until Tuesday.

HIS HONOUR: Thank you, Mr Yezerski. Mr Moses.

MR MOSES: Yes. Thank you, your Honour. Your Honour, I intend just to deal with – if I can refer to it as the relevant submission – as to what the case is about and what it's not about, and then deal with the matters raised by our learned friends acting for the respondents. Your Honour, the issues raised by the appellant interlocutory application, including the subpoenas and notice to produce are in aid of an application which raises matters of legal importance. They go not merely to the conduct of the proceeding but to the integrity of its foundation, namely the entitlement of a party to prepare his case and consult with his legal representatives, free from surveillance or intrusion.

Where there is reason to suspect that privileged legal information has been accessed or reviewed by the opposing party, and where gravely that such access occurred without disclosure and without – and with forensic vantage to the respondents, we respectfully contend, as the cases demonstrate, that it's incumbent on the court, not least in the public interest, in maintaining confidence in the administration of justice to ensure those matters are properly ventilated and addressed.

Underpinning our client's application is a recording involving the second respondent, Mr McKenzie, and person 17, an anonymous person, using an untraceable proton mail email address, sent that recording to my client's former solicitor last month. And your Honour will note, of course, our friends have referred to the relevance or otherwise of communications from 25 March 2025 onwards. That was the date upon which the solicitors for the appellant made contact with the solicitors for the respondents to inform about that communication.

To say that its contents are shocking would be an understatement. And to be clear, so we don't get involved in a debate with our friends about what they consider to be relevant or not, at the very outset of the recording – and this is in evidence, of course

– Mr McKenzie makes a series of damning and unambiguous admissions. He states, and I quote:

> *Daniel Scott and Emma Roberts are actively like briefing us on his legal strategy.*

He pleads with person 17 not to tell Mr Levitan or Ms Cowden – Ms Cowden being her lawyer –

> *Do not tell Dean, please, or Monique or anyone that I've told you this-*

and then says-

> *I've just breached my fucking ethics. If Dean knew that and Peter knew that, I would get my ass fucking handed to me on a platter.*

Now, they're not oblique remarks. They're direct and contemporaneous acknowledgements of covert and unethical conduct, and they frame the entire application. They make plain that Mr McKenzie knew what he was doing was wrong. The subpoenas and notice to producer directed precisely at determining how far that knowledge extended and how that material was handed. Now, Mr McKenzie has served an affidavit dated 14 April. I will reserve the bulk of my submissions on that evidence for next week's hearing, and I refer to it as evidence advisably, your Honour but can I say this. The affidavit is not an answer to what is plainly said on the recording. It is a post hoc rationalisation, speculative, reconstructive, and, with respect, implausible. We will contend it is a pyramid of lies. Mr McKenzie does not deny that the recording is genuine. He does not resile from the language used. What he offers, instead, is a retrospective reinterpretation of what he may have meant or intended to say. Now, critically, your Honour, and this is important in respect to Mr Bartlett and Mr Levitan, each of whom is the recipient of subpoenas to produce documents and give evidence, Mr McKenzie's own affidavit confirms that he was actively supplying them with information he obtained from Danielle Scott, including documents and images.

And I just ask your Honour to note paragraph 43 of his affidavit that your Honour has not been taken to by our friends, and yet this is their evidence. Paragraph 43 of his affidavit contends that all the material he obtained from Ms Scott was sent to MinterEllison. This included documents or images provided to him that he believed were relevant. He asserts that he did not believe the material he obtained from Ms Scott was privileged to Mr Robert Smith, or that he was acting improperly by obtaining it. Importantly, your Honour, he asserts that no one had suggested to him that any of the material he obtained from Ms Scott and provided to MinterEllison was or might be privileged to the appellant, or that he acted improperly in obtaining material because it was or might be privileged to the appellant. So unpacking that, your Honour, there appear to be three propositions that they're going to try and advance as a fig leaf in respect of their explanation for this nonsense. First, all material he obtained and sent to MinterEllison from Ms Scott, there's no contest that

Mr Bartlett and Mr Levitan had carriage of the matter, and that they were the ones who were in charge of the file at MinterEllison.

Secondly, he asserts those two individuals did not suggest to him that any of the information he was giving them was privileged or might be privileged. So he is, in effect, using them as a shield to say I gave it all to them, and they never said anything to me that it was wrong. So he's putting them forward as a defence mechanism in this matter. That's what he's going to hide behind. No secret there. So he has brought them well into play in respect to this matter. Third, implicit, is that he was free to use it as of course, were the lawyers who acted for all the respondents. Mr Levitan and Mr Bartlett acted for all the respondents. And to be clear, because my learned friend for the respondents seeks to focus, as he's entitled to, on the amended notice of appeal. It's plain that the misconduct of the second respondent, if maintained, if made out, contaminates the other respondents because it has been provided to the lawyers who act for all of them. One of the central issues that the court will need to grapple with, and your Honour has stated you haven't looked at the exhibits yet, to Mr McKenzie's affidavit, where he provides us with a selection of what he sent through to Mr Levitan and Mr Bartlett, is whether any of that material is privileged in the sense of revealing evidence of privileged communications between Mr Roberts and his lawyers.

And secondly, if it does, then the court will need to make findings as to the assertion contained in paragraph 43 as to whether it believes Mr McKenzie that no one ever suggested to him that any of the material obtained was privileged, and what were Mr Levitin and Mr Bartlett thinking when they looked at that material and formed the view, as officers of the court, they had no obligation to raise these matters with their client to tell him, well, wait a minute, Mr McKenzie, why are you getting this material to us? You should not have access to this information. Now, we are not at the stage yet, of course – and one would hope that we don't get to this stage in this case – that we have to make direct allegations concerning Mr Levitan and Mr Bartlett. But we don't know what their position is, of course. All we do know is that documents were given to him by Mr McKenzie, and he said no one suggested to him there was anything wrong. Well, there's going to be a contest between them. It's probably a reason why they've got separate representation. Did they actually read the material? Did they form a view about it? Did they say anything about it? What did they do with it? What did they think was going on?

Now, in relation to these matters, your Honour, the issue, of course, is, as he says in his affidavit, it was his practice to pass on anything he considered relevant to MinterEllison. And while he denies knowing that such material is privileged, that's not the point. The issue is whether it was privileged, and the issue is what were Mr Levitan and Mr Bartlett thinking when they got that material, and what did they say to him, or did they not say anything to him as he says. And the subpoenas are directed at uncovering whether those senior solicitors actually looked at this material, and what did they do or not do with him? Because he says they suggested nothing to him. Now, we don't know what their explanation is. No doubt they will be providing one.

HIS HONOUR: Am I right in thinking there is an anterior issue here about whether the communications in questions or documents – I don't know what they are, -is there going to be a debate about whether they are privileged or not, or is it too early to say?

MR MOSES: I don't know, your Honour, what our friend's position is going to be. I mean, they seem to be saying it wasn't privileged.

HIS HONOUR: Right. Okay.

MR MOSES: But that's a horrible mistake to make when one comes to look at the material.

HIS HONOUR: I haven't looked at the material, but I'm just kind of curious about it.

MR MOSES: Yes. Now – yes. Well, I mean, I will be interested to see how they're going to make good that proposition, your Honour, at the hearing in relation to the matter. Now, the respondents say, of course, your Honour as they invariably do in these types of applications, that we're engaging in some sort of fishing expedition. And with respect, your Honour, this isn't a fishing expedition. I mean, to use the words of the French President, we don't think we know what was -what has gone on here in terms of the access to the privileged communications of the appellant, because Mr Mackenzie, by his own words, has of course made admissions concerning that and there has been material, your Honour, that they have produced in respect of exhibits to his affidavit.

Now, my client isn't casting lines at random. We're tracing what we know are the ripples of a breach that has already surfaced by reason of Mr McKenzie's own words. And it doesn't get better for him, your Honour. It gets worse in respect of his affidavit, because, for whatever reason, that affidavit digs a bigger hole for him. And I won't be, of course, providing Mr McKenzie with any, as it were, indications of where things may be going for him next week, but can I just make these observations if I can.

Since my client filed this application, there have been two startling and telling developments which are relevant to the subpoenas and the notices produced which call into question the adequacy of their discovery and compliance orders for production. First – and this is one of the documents we seek, your Honour – in a letter sent by the respondent solicitors to my instructing solicitors on 22 April – and your Honour will find that at page 109, exhibit JCB1, to Mr Beaton's affidavit – it is now admitted for the first time, that a handwritten file note was created by Mr Levitan, recording - - -

HIS HONOUR: Hang on a second.

MR MOSES: That's at paragraph – page 109, your Honour, of Exhibit JCB1. They told us for the first time that, in fact, there was a handwritten file note created by Mr Levitan recording a meeting on 14 March at Emma Roberts' home. That meeting, it is said, was attended by Mr McKenzie, Mr Bartlett, Mr Levitan, Ms Roberts, Ms Scott and another individual. That meeting, of course, is directly relevant to paragraph 60 of Mr Mackenzie's affidavit.

Now, the evidence of Ms Roberts at trial was that counsel was there as well. I think the senior counsel was there as well, but Mr Mackenzie states he doesn't recall that. Of course, we will explore that with him. But it's instructive to note, your Honour, that the trial – and the evidence will recall this next week when we take the call to it – no attempt was made by the respondent's then legal team to attempt to correct Ms Roberts' evidence, despite them being in court when that evidence was given.

The note is plainly responsive to the notice to produce served on 15 February 2022. It was called upon in court before the trial judge on 16 February 2022, and they said there were no documents to produce. Now, the court was told by the then counsel, in the presence of Mr Levitan, there was nothing to produce. That statement was false. Whether that was a deliberately false statement or not we don't know, because there's no sworn evidence explaining this. But - - -

HIS HONOUR: So the correct statement would have been there is a document, but it's privileged.

MR MOSES: Correct. But they didn't – they said no documents to reduce. It's now admitted that the document existed and is being withheld on grounds of privilege. Now, I foreshadow, your Honour, that we will be asserting it's plain there has been a waiver of privilege in respect of this matter because, of the matters in Mr McKenzie's affidavit.

HIS HONOUR: Which particular bit in Mr McKenzie's affidavit?

MR MOSES: Well, your Honour they say – he says that there was a meeting held and there was no privileged information that was provided at that meeting by Ms Roberts. Now, you can't make that assertion but then withhold the file note of the conversation that is said to have occurred at that time, because how do we test it? How do we test it?

HIS HONOUR: So that raises a practical question. As the wagons are currently drawn up, it looks like that is a question which you will be asking the Full Court to ventilate next week.

MR MOSES: It may or may not be, depending on, at the time of the production of that document, because we've sought that, that if there is to be a privileged argument and the court is invited to look at that document upon ruling upon it, if that's what our friends want, it's a matter for the Full Court as to whether it would look at that document itself to make that ruling, or whether it is something that would need to go

before somebody else. But that would be their call. Our position would be that the Full Court could deal with it, if need be, on that occasion. I mean, in other privilege arguments, Abraham J has been dealing with those in the course of trial. It just depends on what position the respondents wish to take, your Honour, in respect to that.

HIS HONOUR: All right.

MR MOSES: Now, as your Honour might expect, of course, an explanation was sought about this, and we received a response yesterday. It's not in Mr Beaton's exhibit, but I think probably for the sake of completion, I should just tender that, because I think Mr Blackburn and Mr Bender probably should, of course, be aware of it. I'm not sure what the state of their knowledge is yet of all of this - - -

HIS HONOUR: Are you applying to reopen your case on the interlocutory - - -

MR MOSES: I'm sorry, your Honour?

HIS HONOUR: Are you applying to reopen your case on the interlocutory application, Mr Moses?

MR MOSES: Well, yes. Yes, your Honour. Just - - -

HIS HONOUR: Is that leave opposed, Mr Yezerski?

MR YEZERSKI: No, your Honour.

HIS HONOUR: Leave is not opposed. Leave is granted.

MR MOSES: It's a rookie's area, and I apologise.

HIS HONOUR: Exhibit 1.

MR MOSES: So, your Honour that's the response we received yesterday, and with respect, your Honour - - -

HIS HONOUR: Yes, sorry. Let me just have a read of that. All right.

MR MOSES: Now that, as your Honour will see, basically the explanation is we missed it. It wasn't deliberate and didn't matter anyway. And they, of course, concede generously that it was regrettable. Now, that is not an answer. It's really a shrug dressed as a submission. The document was plainly responsive. The author was in court, and the court was told it didn't exist. That is not a regrettable slip, and it requires a bit more of an explanation than that in respect of the matter. Now, as I said, your Honour, can I go to the second development? I said there had been two developments. Can your Honour go to paragraph 44 - - -

HIS HONOUR: Actually, just before we move on from the first development, just so I can just understand where this fits in. So, Mr Mackenzie says there's a meeting.

MR MOSES: Quite.

HIS HONOUR: A dinner party, I think.

MR MOSES: No.

HIS HONOUR: Not a dinner party. All right.

MR MOSES: No. It's not a dinner party. He gives evidence that he had dinner with Mr Levitan, Ms Roberts and Ms Scott. He said it was a dinner in which, I think, nothing of any substance was discussed. That's what he says. Mr Levitan didn't make a file note of that dinner. I mean, he may have, but we don't know. But this is the file note of the 14 March 2021 visit to the home of Ms Roberts, which occurred in the presence of the lawyers, being Mr Bartlett, Mr Levitan and the like, your Honour. So Mr McKenzie says had a meeting with them but nothing was discussed that could be said to be privileged at that meeting. That's what he says. And your Honour may recall this is - - -

HIS HONOUR: But why does it matter what happens at that meeting?

MR MOSES: Because he says I didn't receive anything. This is how they sought to frame the - - -

HIS HONOUR: I didn't get any privileged information from Ms Roberts.

MR MOSES: Quite. Yes, quite. So they're trying to frame all these dealings that predate the recorded conversation with Person 17 to demonstrate that these were the dealings I had. Nothing was provided to me, or given to me, or said to me, that can be said to be privileged.

HIS HONOUR: That is, privileged in your client's hands.

MR MOSES: Quite. Quite. So that's – so he's saying nothing was discussed, and we will have much to say next week about the objections to this affidavit, but as it were, he's saying we had this meeting, nothing was raised about that. There's a file note of that meeting. We're entitled to get that. We say (a) there has been a waiver, and (b), of course, a matter of fairness dictates that we get that file note to test his evidence. Bearing in mind at this point, he's - - -

HIS HONOUR: Can I ask you to think over lunch, which is coming up in a moment, this question of waiver, and having a substantial debate about waiver of privilege, troubles me for logistical reasons.

MR MOSES: Of course.

HIS HONOUR: And I would just sow the seed of perhaps having one of the judges determine that beforehand, or having another judge determine that question in advance of the hearing. Because - - -

MR MOSES: That would be our preference.

HIS HONOUR: Because you will want to cross-examine - - -

MR MOSES: Of course.

HIS HONOUR: - - - on the file note and if we're caught up in a three-hour privileged fight in the hearing, which is only two days long - - -

MR MOSES: No.

HIS HONOUR: - - - that has got a real potential to discombobulate things.

MR MOSES: No, I agree with that, your Honour. Yes. So, your Honour, could I just quickly move to the second development. At paragraph 44 of his affidavit, Mr Mackenzie acknowledges that he recorded two lengthy conversations with Ms Scott in August 2020 – conversations that plainly fell within the scope of the respondents agreed discovery obligations at the trial which included categories 1(a) and 1(b). Now, he says those recordings were provided to Mr Levitan, the solicitor, at the time, yet they were never discovered at the trial and they have only been given over because they have been exhibited to this affidavit. Now, while Mr McKenzie now says he forgot about the recordings until this matter arose, there is no explanation as to why the lawyers failed to ensure their production. No evidence about this from Mr Levitan, no evidence from Mr McKenzie about this in terms of how - - -

HIS HONOUR: They would have been – they were discoverable but privileged.

MR MOSES: No – well, these were – these were recorded conversations, your Honour, between Mr Mackenzie and Ms Scott – Ms Danielle Scott. That's paragraph 44, your Honour. So – yes. And they're an exhibit to the affidavit, these recordings, but what will become apparent, your Honour, in terms of the entirety of that transcript when it's reviewed on the application next week, is that there is disclosure of privileged information being provided to Mr McKenzie.

Now, the omission to have discovered this at the trial remains wholly unexplained, despite a request that it be explained, and it reinforces the forensic justification for the notice to produce, and the subpoenas now on foot, including those directed to Ms Scott and Mr Levitan and Mr Bartlett. At the very least it confirms that their discovery was deficient and non-compliant. But in any event, your Honour, in terms of that issue, as I said, this is a matter that only been revealed because of Mr McKenzie's affidavit. It's some sort of purported attempt to put them before the

court as if somehow that is meant to assist his position. In fact, it has actually worsened it for him.

Now, your Honour, in respect of the subpoenas and the notice to produce, this is – and I will come to deal with these specifically after lunch – but they directly arise, in large measure – large measure, from the respondent's own affidavit material, being the affidavit Mr McKenzie affirmed on 14 April 2025. Each subpoena is confined in scope and directed at a narrow class of communications. Now, can I just make a general observation about the date issue that my learned friend has raised

.He says that the endpoint should be 30 April 2021, not 22 July 2022, when the trial concluded. And he says the reason for that is that that tethers it to the apparent date of the recording being in March or April 2021. It will be interesting to note, your Honour – no doubt our friends have worked this out because they will no doubt be providing explanation for this at some stage – when this matter was raised with MinterEllison, they said this recording occurred on or about 24 April 2021. That doesn't now align with Mr Mackenzie's affidavit. Somebody seemed to be quite certain as to when that date of that conversation was.

But just to observe, your Honour, in terms of the rationale behind my friend's submission about the date, what we're looking for is what then occurred beyond that conversation in terms of the use or communication or otherwise of the revelations of the privileged communications that had apparently taken place between Ms Scott – primarily Ms Scott, it would appear from the affidavit of Mr McKenzie, that is his communications with her primarily – and Mr Mackenzie and what he was relaying to the lawyers about these matters.

And, your Honour, our friends go back to the amended notes of appeal, but let's be blunt about it: it doesn't take a forensic expert to work out the relevance that once information is handed over to the lawyers concerning what has been said to Mr McKenzie by Ms Scott as to whether they took any steps or did anything to follow that up with her in respect of those matters, in order to obtain further lines of inquiry.

Now, it's quite evident what we're dealing with here is a case where the privileged communications of the appellant were the subject of, in effect, provision we contend unlawfully to Mr McKenzie by at least Ms Scott.

Now, the lawyers acting for the respondents were told by Mr McKenzie were given everything that he considered relevant to them. They got it all. And somehow it's suggested that it is not relevant for us then to look at what communications they may have been having directly with Ms Scott, as an example, to ascertain what use or otherwise was being made of that information. And this is a rather curious case because, as I said, my learned friend hasn't said it. I mean, he may say it. He may have said it. I don't know.

I mean, it might be a more question for Mr Bender and Mr Blackburn whether they have instructions to say what their client's position is about receipt of privileged

communications concerning the appellant and his lawyers and whether his clients were told anything about Ms Scott seeing them. I mean, that's a matter for them to reveal. I assume in due course they will take a position on that based on what their instructions are, but this is not a case to be dealt with as technicalities. This is a matter that goes to the heart of the administration of justice.

HIS HONOUR: So there are two large questions. One is, are the communications which are identified in Mr McKenzie's affidavit but which no one has taken me to – are they in fact privileged communications?

MR MOSES: Quite.

HIS HONOUR: And then the second question is, is the file note of the meeting a privileged document?

MR MOSES: That's another issue. That's correct, your Honour. But in respect of what was being conveyed from Mr McKenzie to the lawyers acting for all the respondents, was what was being communicated to them by Mr McKenzie that he was getting from Ms Scott because he says, I gave it all to them – paragraph 43, your Honour will recall – and they never suggested to me it was privileged, they never suggested to me that what I was doing was wrong.

HIS HONOUR: Is that a convenient time, Mr Moses?

MR MOSES: I apologise, your Honour. Yes it is. I do apologise.

HIS HONOUR: That's all right. The court – the court will adjourn until quarter past 2.

ADJOURNED **[12.49 pm]**

RESUMED **[2.16 pm]**

HIS HONOUR: Yes, Mr Moses.

MR MOSES: Yes. Thank you, your Honour. Your Honour, before I deal with the categories of documents in the notice to produce and the various subpoenas, I just wanted to address an issue in respect of how our learned friends seek to frame the appellant's case, just to be clear. The propositions that will be advanced in respect of this matter are these, that, firstly, there is evidence that Ms Roberts and Ms Scott were, we say, dipping into emails of the appellant without his permission. So that's the first proposition. That included email communications from the lawyers acting for the appellant. Second, information concerning those emails, at the very least, were provided to Mr McKenzie, who then provided them to the lawyers acting for

the respondents. Thirdly, that information provided a basis for forensic decisions and was information, as I said, given to the lawyers. Fourthly, that information was not limited to Person 17, but as the evidence will demonstrate, extended to matters other than person 17, and that's on their own case, on their own evidence. So I just want to be clear about that.

HIS HONOUR: Well, that's not what particulars 35 and following say.

MR MOSES: In terms of, your Honour?

HIS HONOUR: Well, you've articulated the case, but the only formal procedural document in front of me - - -

MR MOSES: Yes.

HIS HONOUR: - - - is the proposed amended notice of appeal - - -

MR MOSES: Yes.

HIS HONOUR: - - - and what you have just articulated is not what is in particulars 35 - - -

MR MOSES: Well, we – apologies, your Honour.

HIS HONOUR: - - - to 38.

MR MOSES: Well - - -

HIS HONOUR: So, for example, there's a subtlety in what you just said - - -

MR MOSES: Of course.

HIS HONOUR: - - - which is you didn't use the word legal professional privilege in that articulation, which may suggest - - -

MR MOSES: No.

HIS HONOUR: - - - you've slipped into - - -

MR MOSES: No, it's - - -

HIS HONOUR: - - - a confidential information case.

MR MOSES: It's privileged. It's privileged information, your Honour, to be clear.

HIS HONOUR: It is privileged.

MR MOSES: Yes.

HIS HONOUR: So - - -

MR MOSES: To be clear, yes.

HIS HONOUR: And is that an essential part of the argument?

MR MOSES: It's a part of the argument, your Honour, yes.

HIS HONOUR: But it's not an essential part. You don't need to be bound by it. This is not the hearing of the actual case.

MR MOSES: No, of course.

HIS HONOUR: But, you see, even if you and I are having this discussion - - -

MR MOSES: Yes, of course.

HIS HONOUR: - - - about what exactly this is, it puts a little bit of colour in what I just said, which is that - - -

MR MOSES: Of course.

HIS HONOUR: - - - the current formal articulation - - -

MR MOSES: Yes, of course.

HIS HONOUR: - - - of what your case is, is not the way you've just expounded it.

MR MOSES: No, of course. I mean - - -

HIS HONOUR: And I have to decide this by reference to the formal documentation.

MR MOSES: No, absolutely, your Honour, but this aligns – our resistance of their application aligns with what is pleaded currently in the amended notice of appeal. It sits there in terms of we make it very clear, your Honour, in respect of the complaint here, that Mr McKenzie was given access to privileged information belonging to the appellant which he retained, and retained, of course, and used, because he gave it to the lawyers.

HIS HONOUR: So the privileged material is the – I had a look at the material.

MR MOSES: Quite.

HIS HONOUR: It's at page 211 of the exhibit. It's the two conversations with Monica, between Monica and Emma; is that correct? Plus - - -

MR MOSES: Not – I apologise.

HIS HONOUR: Plus also the legal strategy statement.

MR MOSES: And not limited to that, your Honour.

HIS HONOUR: What else?

MR MOSES: There is other information in the exhibit that goes beyond that; that is, the exhibit attached to the McKenzie affidavit that was filed on 14 April.

HIS HONOUR: Well, I think I better know what they are.

MR MOSES: Yes, your Honour. Could you just bear with me? Your Honour, could I just have a moment?

HIS HONOUR: Of course.

MR MOSES: Yes. Your Honour, can I draw your Honour's attention to this, and this, your Honour, is something we were going to raise next week, but we will do it now. Can your Honour go to Mr McKenzie's affidavit - - -

HIS HONOUR: Yes.

MR MOSES: - - - just as an example. Exhibit NM-1 - - -

HIS HONOUR: Yes.

MR MOSES: - - - at page 215, and this is, your Honour, part of what I referred to as the pyramid of lies in this circumstance. There is, sent to Mr Levitan and to Mr Bartlett, an email from Mr McKenzie in which he expressly refers to, on 31 July, Mark O'Brien – that's his solicitors - - -?---

HIS HONOUR: Hang on. Where are you reading from?

MR MOSES: Does your Honour have page 215?

HIS HONOUR: Yes. I'm at page 215.

MR MOSES: I will give your Honour the reference, because I'm trying to read from the open exhibit, not the - - -

HIS HONOUR: Yes.

MR MOSES: - - - confidential exhibit that appears. So page 215, your Honour.

HIS HONOUR: Yes.

MR MOSES: And if your Honour goes to under the heading Receiving Multiple USBs.

HIS HONOUR: Yes.

MR MOSES: Your Honour will see the third dot point, "D believes". Do you see that?

HIS HONOUR: Yes, I do.

MR MOSES: Now, your Honour, here, sent to the lawyers acting for Mr McKenzie, that is, all the respondents, is an express reference – and, by the way, this isn't explained in Mr McKenzie's affidavit; in fact, he says the opposite:

> *On 31 July, Mark O'Brien sent Roberts-Smith an email about the Mick Keelty issue, and that the authorities wish to speak to him about misconduct involving a senior AFP officer.*

Now, that was the subject of cross-examination in the proceedings before Besanko J in terms of the attendance of Mr Roberts-Smith in respect of a meeting with Mr Keelty, which was the subject of proceedings before ACLE, which was an investigative agency which was meant to be confidential. Now - - -

HIS HONOUR: But the cross-examination didn't touch on Mr O'Brien.

MR MOSES: Say that again, your Honour.

HIS HONOUR: The cross-examination you just said – there was cross-examination about the Mick Keelty issue, but did that cross-examination include any reference to Mark O'Brien?

MR MOSES: No, your Honour, but - - -

HIS HONOUR: Okay.

MR MOSES: - - - it's the email – the point is, your Honour, on 31 July, this is what Ms Scott is telling Mr McKenzie, and Mr Roberts-Smith's lawyers sent him an email. Now - - -

HIS HONOUR: So you say it's a reasonable inference from that that Danielle – is it Danielle? Yes.

MR MOSES: Yes.

HIS HONOUR: Danielle has had access, or someone has had access to an email from Mr Roberts-Smith's solicitor?

MR MOSES: A hundred percent, your Honour. I mean, there's no other way to read it, with all due respect; no explanation. And let's be clear about this, so - - -

HIS HONOUR: No, no, I understand. I'm just trying to - - -

MR MOSES: Yes, but I want to be crystal clear about this, your Honour: Mr McKenzie, in paragraph 43, says that the gentleman, Mr Levitan and Mr Bartlett, apparently made no suggestion to him about anything that he was being given was privileged, or he shouldn't have it.

HIS HONOUR: No, no. I understand that. I'm just trying to - - -

MR MOSES: This – this - - -

HIS HONOUR: I'm just trying to - - -

MR MOSES: Yes.

HIS HONOUR: I'm just trying - - -

MR MOSES: And I want to be clear about this, your Honour.

HIS HONOUR: I'm just trying to understand - - -

MR MOSES: I understand.

HIS HONOUR: - - - for my purposes what - - -

MR MOSES: All right.

HIS HONOUR: - - - what the – so I understand that one.

MR MOSES: Yes.

HIS HONOUR: That's quite clear, that one.

MR MOSES: And this is – and, your Honour, the – and, your Honour, in terms of this, that's an example, but – and – but, your Honour - - -

HIS HONOUR: Well - - -

MR MOSES: - - - what I just wanted - - -

HIS HONOUR: Can I have them all?

MR MOSES: I will provide them in a moment. I just want – because we've been dealing with our submissions, your Honour, so I will ask for the references, and I will provide them to you before I finish off my feet; okay? So but what I'm saying here, your Honour, is this, to be very clear about this so that those who act for Mr Bartlett and Mr Levitan know exactly what's going on here: Mr McKenzie has, in effect, thrown them under the bus with this, because he says he gave this to them, and they never told him anything.

Now, you would think senior officers of the court, when they received an email like this – and they can't say they forgot about this – please – that they forgot about this email, that when they read this, you would think, as a lawyer, speaking honestly, "What the hell is going on here, Mr McKenzie? Why are you being told about emails that are being sent from the appellant's lawyer to him about matters to do with Mr Keelty? What is going on? You shouldn't be getting this information." According to him, these two didn't say anything; that's a problem. This is huge. And, there, they come here, and they say, "Nothing to see here." My learned friend, on instructions, of course, from the respondents, senior counsel gets up and says, "Nothing to see here. There was no privileged communications provided or disclosed." Really? Is this what's going on?

Do they actually know what they've done? They've attached to Mr McKenzie's affidavit the actual bullet in respect of what they've done here, and he doesn't explain in his affidavit. Maybe he was too hurried in preparing it, as it was served late, but what they did by handing that over is kill their case in defence of this matter, because what they did in respect of this matter was to basically say that he did tell them about an email that the law firm sent to Mr Roberts-Smith, and there's no explanation in there.

Now, he says, "I didn't know it was privileged." Really? A senior journalist did not know that an email being sent to Mr Roberts-Smith by his lawyers was not privileged and they attacked him in the trial concerning Mr Keelty and his contact with him. They attacked him and they went after him in respect of his conversations with Mr Keelty and they laid it out big in their submissions on consciousness of guilt concerning him meeting the former AFP Commissioner. Why would you do that? Were you trying to find out information about what's going on? How did they know about this? I mean, they have some real problems when it comes to this issue concerning this matter because they haven't addressed it in their submissions – sorry, I withdraw that – in their evidence. They haven't addressed it, nor have they addressed it in their submissions to your Honour today.

So this just plainly is relevant, your Honour, to what has going on here and the explanations proffered by this individual. Now, can I just deal front up, your Honour, the reason I wanted to address this now is at paragraph 7 to 10 of the notice to produce, our friends say, "Well, what's the relevance of this?" And I'm going to seek your Honour's leave, if your Honour would indulge me, just to tender, your

Honour, a letter that was sent on 24 March by Mr Bartlett, signed by him, but the contact being Mr Levitan. Now these, you would think - - -

HIS HONOUR: So you're re-opening your case again?

MR MOSES: I am.

HIS HONOUR: All right.

MR MOSES: I might as well just do it now, your Honour, and get it over and done with and I will cop the pain.

HIS HONOUR: Mr Yezerski, any objections to - - -

MR YEZERSKI: I'm sorry, your Honour, I was temporarily distracted. What's being tendered now?

MR MOSES: ..... it's a letter from your solicitors.

MR YEZERSKI: No objection.

HIS HONOUR: All right. That can be exhibit 2.

EXHIBIT #2 LETTER FROM MR BARTLETT DATED 24 MARCH

HIS HONOUR: Can I - - -

MR MOSES: So, your Honour - - -

HIS HONOUR: I think Mr Yezerski has stolen the exhibit.

MR YEZERSKI: I'm sorry, your Honour.

MR MOSES: No, it's okay. I've got multiple. And, your Honour, just while I'm on this - - -

HIS HONOUR: Should I read this?

MR MOSES: Yes. So, your Honour, this is the explanation that is given in respect of what is said to be the reference to the privileged information. Now, this is written, your Honour, by individuals who are named in the recording. That is Mr Levitan and Mr Bartlett, presumably after they spoke to Mr McKenzie in respect of what is said to be the explanation given in respect of the access to the privileged communication. Now, in respect of this, we're entitled to test, in respect of these issues, what these individuals who are plainly witnesses involved in these matters involving access to

information belonging to Mr Roberts-Smith, what they talked about when the letter landed on MinterEllison's desk or Mr Levitan and Mr Bartlett's desk about this conversation.

I mean they were potential witnesses in respect of all this; they should have known that, but they went forth at this point and decided it was a good idea for themselves to respond to this, presumably after they spoke to somebody.

HIS HONOUR: Okay. Can we go back a little bit.

MR MOSES: Sure.

HIS HONOUR: So we've moved on from the Mark O'Brien point and you're now addressing me on paragraph 7 to 10, the notice to produce.

MR MOSES: I am.

HIS HONOUR: So can you just - - -

MR MOSES: Yes.

HIS HONOUR: - - - bearing in mind that I'm not across the detail in the way that you are, can you just run me through that again?

MR MOSES: Yes, of course. So - - -

HIS HONOUR: Where this letter fits into that.

MR MOSES: So this letter, your Honour, is the explanation for what is said to be their response to the totality of what is said to have been the privileged communications that they had access to. So there's no disclosure in this letter, for instance, your Honour, about anything to do with what I just showed your Honour about, in effect, evidence being provided to them by Mr McKenzie about privileged communications being, in effect, accessed or told about by Ms Scott to Mr McKenzie. You would think in a letter such as this – and your Honour goes to paragraph 7, for instance – that you wouldn't just answer the question in the way that they did, but you would go on to disclose anything else, but nothing else was disclosed about privilege.

They said, basically, this wasn't privileged and this was the sum total of it, basically. And, your Honour, just another example, your Honour asked me for examples, I should give them to you now, your Honour asked for them., Exhibit NM1, page 209, and exhibit NM-1, page 215.

HIS HONOUR: So just starting at 209.

MR MOSES: At page 209, your Honour, there's a reference to BRS, which is Ms Roberts has knowledge that BRS met with person 29 and Monica on December 4 2019, to pass to him documents to help to prepare for his IGADF interview, "Must discuss with the ARS". Now, that information, your Honour, sits there in the context of what is said to be the communications, because he sent this to the lawyers saying these were the communications that he was sending to them in respect of information he was receiving from Ms Scott.

And if your Honour goes to page 215, yes, it's – this is to do, your Honour, with evidence that was being given to the IGADF, that is, as the Inspector-General of the Australian Defence Force, that once Mr Roberts-Smith got images, he selected certain images to pass to the IGDAF, and he provided only 17 images to the IGADF. Now, in respect of this, this is in the context in the period where Ms Scott had access to the emails of Mr Roberts-Smith. Now, no evidence as to where she got that information from. We will be saying the inference is that's because she was dipping into his emails.

HIS HONOUR: But is this still on the privilege point?

MR MOSES: Correct. Correct. And - - -

HIS HONOUR: See, I see the reference to – another reference to Mr Mark O'Brien's email - - -

MR MOSES: Yes.

HIS HONOUR: - - - in the third point.

MR MOSES: Yes.

HIS HONOUR: So that's a – you say that's a privileged communication.

MR MOSES: Correct. Correct, your Honour.

HIS HONOUR: So just to be clear, will you be saying next week that – so, clearly, you will be pointing to instances of privileged communications, what you say are privileged communications. So I think I've seen four of those now, four candidate privileged communications. You said then a moment ago, this – clearly, this shows that Danielle has had access to his email.

MR MOSES: That's what we invited the court - - -

HIS HONOUR: But that's a breach of confidence case, that's not a privilege case.

MR MOSES: Well – but your Honour, it's the point about how she got access to the privileged information belonging to Mr Roberts-Smith that was provided to Mr McKenzie. So he's - - -

HIS HONOUR: That's through – I think there's some suggestion it was just because Emma had administrative privileges on the account or something, as I recall.

MR MOSES: Ms Roberts did.

HIS HONOUR: Yes.

MR MOSES: Which Ms Scott accessed, and there's evidence about that which we will take the Full Court to, but the point, just to focus on the facilitation of all this, is that that's the means by which the evidence flowed to Mr McKenzie, because Ms Scott passed on information to him, which he then passed on to lawyers. One example is the one that I took your Honour to, which is the email that was sent by the lawyers acting for Mr Roberts-Smith to him. Now, about a topic, a topic that was the subject of cross-examination in the trial. Now – and a topic which they went hard on, they went big on it, in terms of credit issues that they invited the trial judge to make.

And just while I'm on credit issues, your Honour, my learned friend – this has been said a number of times, including in this letter from Mr Barclay, signed by him, Mr Levitan, the contact person. They continually talk about the Person 17 issue on the basis that it had no impact on the outcome of the case. Well, that's not the test, by the way, that they – and they bear the onus on the test for next week in terms of whether there was any real prospect that it didn't impact the outcome of the case.

What they've forgotten about is that, in the appeal before the Full Court, they took it upon themselves, because they wanted it to be in the Full Court appeal book, the issues and the cross-examination of Mr Roberts-Smith concerning Person 17, and they sought to lean on that, in terms of credit issues concerning Mr Roberts-Smith, and the overall approach. So I don't know what they think was happening in the appeal court, but, certainly, the way that Mr Owens, as he then was, and the way that the submissions were being shaped, was to refer to this. So they can't say, well, this is a silo that didn't really – no harm, no foul. So even if Mr McKenzie is called out, no harm, no foul. That's not true.

HIS HONOUR: So particular 35 says "confidential and privileged". So the way I read 35 is that you're reopening, and a new appeal point is that because privileged and confidential information – I suppose there's a redundancy there; if it's privileged, it's confidential. So - - -

MR MOSES: That's the point, your Honour.

HIS HONOUR: That's just privileged information of yours was obtained by one of the respondents; you've alleged improperly and unlawfully, but - - -

MR MOSES: Yes.

HIS HONOUR: But maybe that's not necessary. So that is the case, that privileged material was obtained.

MR MOSES: Yes, your Honour.

HIS HONOUR: So if it turns out that none of the material in question is privileged, for the sake of argument, but it is apparent that it was imparted in circumstances which would attach an obligation of confidence and equity, but it's not privileged, no case; is that the point?

MR MOSES: I think, your Honour, in terms of the quality of what is said to be that information, that will depend, because it's malleable in terms of the confidentiality that would attach to it, but, your Honour, our primary point, to answer your Honour's question directly, and what we hang our hat on, is the access to privileged information, your Honour. That's the primary point.

HIS HONOUR: Which makes it - - -

MR MOSES: The primary point.

HIS HONOUR: Which makes it very important to identify what the privileged information is.

MR MOSES: Correct. And, your Honour, in circumstances where the respondents haven't been up front, we will be contending – and this is the Blatch v Archer point – with what exactly they had access to, and they've been resisting the subpoenas with some vigour, and, you know, it's open to them to do it, but we haven't even got full disclosure here, because Mr McKenzie hasn't even sworn an affidavit that's true, because he hasn't said, "Well, actually, I did have access to information from Ms Scott about an email she saw from Mark O'Brien concerning the attendance of Mister" – thank you – "at ACLE concerning the former AFP Commissioner". He doesn't explain that in his affidavit. It's almost as if – whoops – that has been forgotten. So what else is out there? We don't know. So if they're not going to come clean and say what they did have access to – and I will come to some of the evidence shortly, your Honour, as well.

If they're not going to come clean about it, then the court draws the worst possible inferences in respect of them, because you don't know the extent of what has occurred here. So the court cannot in any way be in a position to make any findings that seeks to limit the information in the way that they may propose to do next week, because until they come clean about it, there's a problem. I mean, Mr McKenzie plainly, in his affidavit, hasn't come clean, and paragraph 43 – and I say that to be blunt, because there's no point hiding from it. He's, in effect, throwing the lawyers right into this, because he said, "I gave it all to them, and they never have any suggestion", and we're saying, well, wait a minute. This thing here that appears in the exhibit at page 215 – wow – sent directly to Mr Levitan and Mr Bartlett, and they didn't say anything about this. Well, they didn't. Like - - -

HIS HONOUR: So - - -

MR MOSES: - - - they didn't tell you, "What do you think you're doing?"

HIS HONOUR: So you've promised to tell me all the privileged ones you were going to tell me about before you sit down. So I won't harangue you about it, but - - -

MR MOSES: Yes, no. Thank you.

HIS HONOUR: But from my perspective, that's very much at the front of my thinking - - -

MR MOSES: Yes, of course.

HIS HONOUR: - - - is to know what these privileged materials are.

MR MOSES: No. And we're working our way through this, your Honour, because – bearing in mind, your Honour, we're preparing our submissions. They're due tomorrow. So we're working – I mean, this is their material, your Honour, of course. Their material. They put this before the court, but they haven't explained it, and it's privileged communications between Mr McKenzie and Mr Levitan and Mr Bartlett, but – whoops – there it is, and page 215 says:

Legally privileged prepared for litigation factual analysis.

HIS HONOUR: Hang on. Let me find it.

MR MOSES: That's at the top of 215, your Honour.

HIS HONOUR: Well, that, presumably, is Mr McKenzie's privilege.

MR MOSES: Quite. Common interest privilege with the other respondents, I assume. So, your Honour, just in relation to the letter - - -

HIS HONOUR: Exhibit 2?

MR MOSES: Yes. So in relation to this, your Honour, what is said to be the explanation given concerning the issue. This is by participants, we say, in relation to these matters concerning what was being provided to Mr McKenzie by Ms Scott, and then on-provided to the lawyers. We're entitled to know whether they've had any communications, apart from this as potential witnesses, concerning what to make of the recorded conversation and what their position was going to be in respect of the contents of that conversation, because that sets forth an explanation. We're entitled to test, well, what did they communicate to each other. In another case, we would be entitled to that information, to ascertain what witnesses or potential witnesses were

discussing, before putting on evidence before the court to see if there was a scrum down – to use a police term. So we just want to know what's going on here in respect to the communications.

Now, can I just – while I'm on this point, your Honour, address working backwards – paragraph 6 of the notice to produce, which is the Media Watch person issue, your Honour, paragraph 6. I'm not sure, your Honour, our friends have got this, but the application, if your Honour has it, to the court concerning this subpoena?

HIS HONOUR: Yes.

MR MOSES: Attached to it the transcript of Media Watch. I just want to draw your Honour's attention to the second page. There's a reference, after he refers to Nick McKenzie, he says:

> *The reason I told you, that was to say, like, you know, we've got this, and they're not hostile to you. Despite your worst fears, they're not.*

If your Honour sees that. Now, this is interesting, your Honour, because, I mean, let's give Mr Besser a break. I mean, he is a very senior journalist, much respected. He goes on to say this:

> *McKenzie had been asked by his own lawyers not to tell Person 17 that his team did, indeed, have inside information – courtesy of Emma Roberts and her friend, Danielle – a trove – a trove of text messages and emails about how Ben Roberts-Smith planned to undermine Person 17's allegations, but McKenzie, desperate to reassure Person 17, contravened his lawyer's instructions and brought her into the secret.*

Now, that question about the instructions, your Honour, from the lawyers to McKenzie – Mr McKenzie – that doesn't appear in the recording of the conversation between Person 17 and Mr McKenzie. I mean, a sensible reading of this – an inference to be drawn – is that Mr McKenzie – or somebody acting on his behalf – has fed this line to Mr Besser. So, I mean, whoops. I mean, where did this come from? It wasn't made up by Mr Besser. He wasn't saying that he's speculating. This is a positive assertion. And this is in the context of further – in this Media Watch program, and there's no criticism of Mr Besser. He's doing his job. But in the context – no criticism whatsoever of Mr Besser. But there's a reference, then, to what appears to be direct contact with Person 17. Now, what this records is a version given to Mr Besser, by somebody, which alleges that he received instruction from the lawyers not to tell people about this, but that they had inside information, courtesy of Ms Roberts and Ms Scott, a trove of text messages and emails.

Well, where are they? Because they've never been discovered in the proceedings. Never been produced. I mean, you have to ask the rhetorical question, "What the hell is going on here?" But this isn't fantasy by Mr Besser. He's a very experienced journalist, your Honour, and he doesn't go on air to tell fantasies. So, I mean, we're

entitled to know what was said to Mr Besser, or any other person working on that program, in relation to this issue. This, your Honour, is the relevance of this, because, if there is a trove of emails and text messages, well, we haven't seen them. In relation, your Honour, working back – paragraph 5 of the notice to produce, my learned friend, quite correct, we don't press that.

Now, paragraph 4, your Honour, if I ask that your Honour just – of course, go back to paragraph 43 of Mr McKenzie's affidavit – that's where his basically open-ended assertion that every time he received something from Ms Scott, or any person on her behalf, he would, as a matter of practice, forward it to MinterEllison, and that's not red circled in terms of the time. But our friends say that should be red circled up until a particular date, which they've picked as 30 April – 31 May, thank you, 2021, in respect of that date, and they say nothing after that date. We say it's relevant beyond that date to the end of trial. Because what we do know is that Ms Scott, and we can take your Honour to the evidence about this, is that in respect of Ms Scott having access, we don't know what information she took or retained from access to the emails of Mr Robert Smith at a point in time that were then subsequently provided to him. I mean, it's all well and good to say, well, she only had access to a certain point, but that's not the point. The point is, whether she continued to send information to Mr McKenzie that she had harvested from that earlier point in time up until the end of the trial. We're entitled to see that. Like you know, a bit of a late night commercial, but wait, there's more. We don't know. What we do know is, Mr McKenzie's own words. He continued to get stuff from her, and he continued to send it on.

And if your Honour goes to paragraph 34 of Mr Beaton's affidavit, this is the category relating to Ms Scott. Apparently – and this is the troubling feature of Ms Scott, they've got apparently 1113 emails in this category from her, but apparently she has got nothing. Nothing, your Honour. Nada. Nothing. But they've got it. But she has got nothing. But this is the extent of the communications that were going on. I mean, these weren't just, you know, three or four, this was ongoing and extensive. This is large-scale difficulties for the respondents, and how they're going to explain this, when the final submissions come. And then, your Honour, working backwards again to paragraph 3, again, it's the date issue that our friends raised in respect of Ms Roberts and Ms Scott, and in terms of Person 17, your Honour, our friends say, in respect of that, well, there's no evidence she gave information to Mr McKenzie about privileged information. That is true.

But if you go to his affidavit, your Honour 15, 16, 32, Mr McKenzie is, in effect, saying that he spent a lot of time reassuring her and being in constant contact with her to reassure her about the matter, and one of his explanations he gives in his affidavit to show how he was reassuring her to get her into the witness box in respect of this matter, was to tell her that he had – that they had access to the legal strategy. Now, we're entitled to know whether he continued to tell her, bearing in mind she didn't give evidence until 22 March 2022, don't worry, Person 17, we've got this. We know what they're going to do to you. We've seen the legal strategy. It's all good. Come in. Sit in the box. It's going to be good. We're going to look after you

because we know where the punches are going to come from. Is that what he was telling him? We don't know. This is where the attacks are going to come from. We know, because we've been told. I mean, that's the issue of Person 17, because he's the one telling her that he's getting this information. The information that apparently he had been instructed by his lawyers not to tell anybody. And there will be an issue about this, just so that, you know, there's no secret about this.

There's two explanations why the lawyers told him not to tell anybody. Was it because, firstly, that there would be the disclosure of the fact that he had access to privileged communications involving Mr Robert Smith, or was it the fact that he shouldn't be disclosing to her advice they were giving. But when you read his affidavit his explanation for saying that doesn't make sense. Like it's, with all due respect, it's silly. It's implausible because it's a reconstruction. Because your Honour will note in his affidavit, he's surmising what he meant by these words. He's being very careful the way that he says in his affidavit he's – he's surmising what he may have meant by this. And paragraph 2, your Honour, is the same date complaint which we maintain, which is the end of the trial for the same reasons, so too paragraph 1. It's the same issue, your Honour, that just because it was information obtained in earlier point does not mean that it was continued to be shared, or other information obtained, that was then – from that earlier point in time that was given to him.

And your Honour, I will find a reference for you, but there is evidence somewhere in the materials that, in effect, Mr McKenzie is noting that there is an issue about whether Ms Roberts has kept material concerning Mr Robert Smith, I think, for a rainy day or something to that effect, your Honour. I can find you the passage if necessary, your Honour, but that's the point. It's a point about whether they continued to provide information that had been harvested at an early point in time right up to the end of the trial. And bearing in mind, Person 17, as I said, did not give evidence until March 2022 because of the hiatus involved in trial dates involving the COVID issues.

And your Honour, those matters, as my friend very fairly and efficiently pointed out in his submissions that he advanced concerning the notice to produce equally apply to – yes. So your Honour, it's the recording of the – the transcript of the recording. It's exhibit and NM3, and this is a conversation between him and Ms Scott, your Honour, and it's at the bottom of the page. It's the first page, I think it says:

Do you think - - -

HIS HONOUR: I don't think I've got - - -

MR YEZERSKI: I think I can assist my friend. We have prepared, for the benefit of the Full Court, transcripts of the recordings. We've shared them with my learned friend - - -

HIS HONOUR: Yes. I don't have them.

MR YEZERSKI: We have not yet provided them to the court.

MR MOSES: Okay. I thank my learned friend, grateful. Your Honour hasn't got those. That's fine. But there is reference – I don't think there's any dispute about this where he says:

> *Do you think Emma knows? Like does Emma have evidence that, you know, she's keeping for a rainy day about the war crimes?*

I mean, wow. And you have email communications going on, your Honour. So as I said, it's – we will come to this, your Honour, of course, next week but just picking up on what my friend did, and it was efficient, so I just want to be clear. The complaints about Mr Bartlett and Mr Levitan's subpoenas fall within that same range of category as the complaints about the notice to reduce to Mr McKenzie, because they're the companion documents we seek. The same equally applies to Ms Roberts and Ms Scott, your Honour. In respect of Person 17 we rely upon what we've said in respect of the relevance of Person 17. And the ABC, your Honour, is what I've informed your Honour is our position in terms of the notice to produce to Mr McKenzie. So they're the points that we wish to make clear in respect of why these subpoenas that the Full Court issued, after getting – I say this, your Honour – detailed, I mean, detailed contentions concerning why these subpoenas should be issued, that they were complete in terms of the reasons for the request that were made.

These weren't just rubber-stamped at the Registry front office, your Honour. So we contend that these are matters that should be the subject of production, and we're quite content, your Honour, to negotiate with our friends periods for compliance as well as tranches as to when they can comply with getting us material, and what parts of it they can get to us as soon as possible. Can your Honour just give me a moment? And your Honour, I'm just reminded by my learned junior, Mr Scott, that in respect of paragraph 1, there is one concession that we can make, and that is in respect of paragraph 1, that that should be limited to 30 April 2021 based either on the assertion contained in the MinterEllison letter that the conversation occurred on or about 24 April, or Mr McKenzie's evidence that it occurred sometime in March. So we can limit it to that because that relates to the issue of the discussion.

So your Honour, those are our submissions in relation to the matter, and to be clear, your Honour in respect of our submissions concerning Mr McKenzie, and in particular, paragraph 43, we don't know yet what the response of Mr Levitan and Mr Bartlett is in respect of what he has asserted, in particular, that they never told him that what he was giving them was privileged or not privileged. We don't know. So they may take a contrary position to what he has asserted, and they may have said to him something different from what he has told the court. We don't know. But as a matter of fairness, I should point that out because we don't know. Well, all we have at the moment is in his own affidavit and email that he sent to them for the case and which he expressly refers to an email – a reference to an email being sent by the

lawyers for the appellant to Mr Roberts-Smith. Other than that, we don't know what their explanation is at this stage. They may have an explanation. Those are our submissions, your Honour.

HIS HONOUR: Can I take you back to particular 35.

MR MOSES: Yes, your Honour.

HIS HONOUR: Can I get from you your articulation of what the confidential and privileged communications which you rely upon to make good particular 35 are.

MR MOSES: So, your Honour, in respect of specific issues or what we say it is, your Honour?

HIS HONOUR: No, specific communications which you say you can prove now were privileged communications which Mr McKenzie had access to.

MR MOSES: Well, they're the matters that I've identified, your Honour, so far in respect of the matter. We haven't concluded, your Honour, our review of the McKenzie annexures yet. So I think I've referred your Honour to exhibit NM-1, page 209, page 215. Two parts of 215, your Honour. That's so far, your Honour.

HIS HONOUR: So that's the Mark O'Brien email?

MR MOSES: Correct.

HIS HONOUR: And I think that's the two communications between Ms Allen and Ms Roberts-Smith's.

MR MOSES: And also, your Honour, matters pertaining to what Mr Roberts-Smith provided in respect of the IGADF.

HIS HONOUR: Which page?

MR MOSES: It's page 209. Just bear with me, your Honour.

HIS HONOUR: So that's – in terms of looking at the document at page 209, that is the – which entry?

MR MOSES: I will just give you the reference. So it's – 209, your Honour, is the first one that your Honour has referred to correctly, which is the heading – with which is the meeting point with Person 29.

HIS HONOUR: Meeting with Person 29 and following?

MR MOSES: Yes. And then second, your Honour, is page 215.

HIS HONOUR: 215. Hang on.

MR MOSES: And this is the factual analysis.

HIS HONOUR: One second.

MR MOSES: And receiving multiple USBs bearing USBs, IGADF obligations.

HIS HONOUR: Okay, that one?

MR MOSES: Yes.

HIS HONOUR: Receiving multiple USBs.

MR MOSES: And then it's the 215, your Honour, exhibit NM-1, at the bottom, which is the Mark O'Brien email.

HIS HONOUR: And I think that pops up in a couple of places - - -

MR MOSES: It does, your Honour. It appears in the confidential exhibit at some point and, I think, somewhere in the open exhibit.

HIS HONOUR: So that's at page – on – in this - - -

MR MOSES: 215.

HIS HONOUR: 215. I'm just trying to find it.

MR MOSES: And, your Honour - - -

HIS HONOUR: Yes, I see it. 215.

MR MOSES: And, your Honour, obviously, paragraph 35, your Honour, was informed by what we knew at the time of the recording being disseminated or disclosed by an unknown person in terms of how 35 is drafted, and we've now received, of course, this further information that has come to light that wasn't previously disclosed and - - -

HIS HONOUR: I suppose, you would add to the list your original point, which is Mr McKenzie's reference to the legal strategy.

MR MOSES: That's correct, your Honour. That's correct.

HIS HONOUR: So that's – so – and I understand your point, but you're still going through - - -

MR MOSES: Yes.

HIS HONOUR: - - - Mr McKenzie's affidavit with a fine toothcomb - - -

MR MOSES: Yes. And active - - -

HIS HONOUR: - - - but this is what you've unearthed so far?

MR MOSES: Yes. And active – and, of course, the reference to the active briefing, his reference to being actively briefed by them as to legal strategy – "actively". So that's what we've uncovered so far, and, your Honour, as I said, that's what we have – the amended notice of appeal and the application, of course, was filed urgently as soon as we were able to do so after engaging in communications with the other side in order to deal with this matter as expeditiously as possible, based on what – of his own admissions concerning the matter.

HIS HONOUR: All right. Now, one point Mr Yezerski raises against you is - - -

MR MOSES: Yes.

HIS HONOUR: - - - some single judge appellate decisions in this court would suggest that the court should be a little circumspect about issuing subpoenas in the appellate jurisdiction. I just wanted to hear what your submission was about that.

MR MOSES: Well, there's no guideline in terms of it, your Honour. It depends on the issue that the court is dealing with here. This relates to, your Honour, the very foundation of the conduct of a fair trial. I mean, the administration of justice, in essence, your Honour, has been the subject, we would say, of attack in respect of the fact that the second respondent's misconduct has led to where we are. And I could just provide your Honour with this reference, which your Honour will be aware of. It's District Council of Streaky Bay v Wilson & Ors. It's [2021] FCR 287, FCR 538, and it's - - -

HIS HONOUR: 287, 538? Yes.

MR MOSES: So it's District Council of Streaky Bay v Wilson & Ors [2021] FCAFC 181, and it's page 568 of the report. It's paragraph 149 about evidence on appeal. The Full Court there, of course, made clear that the discretion conferred by section 27 is unfettered, save that it must be exercised judicially and according to principle, and the power to receive further evidence is remedial, and its primary purpose is to empower the court to receive further evidence to ensure that proceedings do not miscarry. It's paragraph 150 where this was said, that Mortimer J, writing separately by agreeing with the orders and declarations of the majority, said the court's appellate task would miscarry if it were to shut its eyes to the existence of the subsequently discovered evidence, and decide the ..... knows is the incorrect and incomplete factual basis.

And here, your Honour – I wasn't, your Honour, of course, in any way using rhetoric. Certainly, in this part of my submissions when I said to your Honour that the issues raised by this matter are matters of real public and legal importance, because they go not merely to the conduct of the proceedings, but to the integrity of its foundation, namely, the entitlement of a party to prepare his case and consult with his legal representatives, free from surveillance or intrusion. And where there is reason to suspect, as appears here, your Honour, that privileged information has been accessed or reviewed by the opposing party, and not disclosed with a forensic advantage, it is important that the court allow its compulsory powers to be used to get to the bottom of this.

And this is a case, as I've demonstrated, your Honour, of at least two serious defaults by the respondents concerning matters directly relevant to this application, one being the file notes of the meeting of 14 March 2021, in which a judge of this court was falsely told by counsel acting on instructions there were no documents to produce, and secondly, two recorded conversations with Ms Scott by Mr McKenzie that he gave to the lawyers, which plainly fell within categories of documents for discovery that were not discovered. I mean, this isn't a case where we're asking for a balance sheet, or a profit and loss statement that may go to some peripheral matter. This goes to the heart of the administration of justice by this court, and the integrity of it, and we know what the High Court has said, of course, about the importance of legal professional privilege and the potential misuse of somebody's privilege.

HIS HONOUR: Yes, I have one other question.

MR MOSES: Yes, your Honour.

HIS HONOUR: It may not be necessary to answer this now. It occurred to me that when proceedings open next Thursday - - -

MR MOSES: Yes.

HIS HONOUR: - - - and Mr McKenzie is called, you're going to put to him that, for example, one or more of these matters you took me to were privileged, and he knew it, and that is almost certainly going to elicit an objection from Mr Yezerski that it's not shown that they're privileged communications. So I had - - -

MR MOSES: Well, that - - -

HIS HONOUR: - - - pictured in my mind a structure of the hearing next week in which one of the questions which the court will have to determine is whether the communications you nominate are actually privileged communications, and that was just something the court would do. But if what I've just said is correct, that, in fact, that question – which is at the heart of the reopening application – will emerge pretty much within the first five questions of your cross-examination of Mr Mackenzie and Mr Jazurski's objection. Does that strike you as a likely state of play?

MR MOSES: I'm sorry. I'm not in the habit of disclosing my cross-examination - - -

HIS HONOUR: No, no - - -

MR MOSES: - - - in court to anybody, to be honest.

HIS HONOUR: No, no, no.

MR MOSES: Even your Honour, with all due respect.

HIS HONOUR: No, no, no. You don't have to answer that, but it just – it seems to me - - -

MR MOSES: No, of course.

HIS HONOUR: - - - that the Full Court is likely - - -

MR MOSES: Of course.

HIS HONOUR: - - - almost immediately, there's a high likelihood the Full Court - - -

MR MOSES: Of course.

HIS HONOUR: - - - will immediately have to decide the very question - - -

MR MOSES: No, of course not.

HIS HONOUR: - - - of what the whole hearing is about.

MR MOSES: No, of course. But, your Honour, there are other issues. Anyway, it will become plain, with our submissions, your Honour – which we're working on which are due tomorrow, and the court will get them – as to how this is going to play out.

HIS HONOUR: Yes.

MR MOSES: Yes, your Honour. But I'm not going to share my cross-examination with Mr McKenzie.

HIS HONOUR: No, no. I was more just concerned about - - -

MR MOSES: We – we - - -

HIS HONOUR: If we - - -

MR MOSES: We can all find that out next week.

HIS HONOUR: If we find ourselves in a point in which the fundamental question at the heart of the application becomes the fundamental point - - -

MR MOSES: No, of course.

HIS HONOUR: - - - at the heart of an objection, then - - -

MR MOSES: Of course.

HIS HONOUR: - - - it could be messy.

MR MOSES: Yes, but there's – yes. Well, the case is going to be messy for some other reasons, your Honour, but not that. There is a way that we're approaching this matter, which your Honour will see in the submissions, which the court will receive tomorrow.

HIS HONOUR: All right. Thank you, Mr Moses.

MR MOSES: But I am conscious of what your Honour has said, and will have regard to what your Honour has said, of course.

HIS HONOUR: I wasn't, in any way, trying to deter you from doing that. I was just - - -

MR MOSES: No.

HIS HONOUR: I'm just foreseeing - - -

MR MOSES: No.

HIS HONOUR: I'm just foreseeing something which will happen - - -

MR MOSES: No.

HIS HONOUR: - - - and which will cause - - -

MR MOSES: I mean, what your Honour has raised, of course, is a matter which we have been considering as to how those matters will be approached but, ultimately, your Honour, there are scenarios – as your Honour is aware – in relation to the cross-examination of witnesses on issues that ultimately are legal questions, as to how those matters can be approached. But here – of course, without disclosing where they're coming from – he has made some pretty bald assertions in his affidavit concerning his view that what he was receiving was not privileged. And his view, ultimately, will be relevant on the question of the access to the privileged information, on one view. But his view will be relevant as to whether he has

deliberately sought to mislead the court on these issues, which means anything that he says on this point cannot be accepted and must be rejected, and allow the court to open up the door to draw the most – worst possible inferences to be drawn against him, in respect of his conduct, given his approach to the way in which he has prepared his affidavit.

HIS HONOUR: And then, one last question – a supplementary question. I think I have extracted from you – if not a promise, then an indication that over the luncheon adjournment, you might consider what your attitude was to this question of whether paragraph 60 of Mr McKenzie's affidavit constitutes a waiver of privilege in the file note. And I think I – we were exploring, tentatively, the prospect that that might be determined before the hearing next week.

MR MOSES: Yes, your Honour. And we're content with that approach that that be dealt with prior to the Full Court hearing, on the basis that that can be at least one issue disposed of, but also would allow us to have – if we get it – ready access to it, so we can use it to cross-examine Mr Mackenzie and Mr Levitan and Mr Bartlett.

HIS HONOUR: All right. Thank you for that indication.

MR MOSES: Yes. So – and we will cooperate with whatever way that is to be dealt with.

HIS HONOUR: Thank you.

MR MOSES: Thank you, your Honour. Are there any other issues that your Honour wishes to raise with me?

HIS HONOUR: Not for now. Thank you.

MR MOSES: Please the court.

HIS HONOUR: Mr Yezerski.

MR YEZERSKI: Yes. Thank you, your Honour. There are a number of short matters in reply, but the most – two of the most important of which spring from matters raised by your Honour. The first is that your Honour asked Mr Moses whether an anterior question arises, on the appellant's interlocutory application, as to whether Mr McKenzie had any information that can be described as confidential and privileged to the appellant and be described as the appellant's confidential and privileged legal strategy. Mr Moses said he didn't know whether that was in issue. Let me be clear, it is in issue. It is one of the principal issues, and the hypothesis that your Honour raised as to the possibility of an immediate objection early in proceedings next week is a very sound one with one qualification, which is that it will be Mr Sheahan making the objection, likely rather than me. But in any event, the issue will arise and it will arise immediately.

We do contend that, given the way the application has been framed by the appellant, it is incumbent on the appellant to identify with precision what the confidential and privileged legal information said to be the legal strategy was that was obtained and retained by Mr McKenzie. That is a question on which they bear the onus, and we will say in due course that they have not and cannot discharge that onus. We have served Mr McKenzie's affidavit. We did that on 14 April 2025. They've had it for over a week. The appellant confirmed this morning that he is not relying on any affidavit evidence in reply. And so the position is that there is no evidence from the appellant, or anyone else for the appellant, asserting that any information in Mr McKenzie's affidavit or in his exhibit is confidential and privileged legal strategy of the appellant. And we do say that that will ultimately be fatal on the application.

Now, that makes it important, with respect, for Mr Moses to answer the question your Honour asked him a number of times which is identify, with specificity, all of the information you say is of the kind described in paragraph 35 of the particulars. We still haven't, with respect, obtained a clear and comprehensive answer. One can appreciate that the task is ongoing in terms of review, but the Full Court will need to know, and we will need to know well in advance of next week's hearing precisely each instance of information that they contend is privileged and confidential legal strategy of the appellant to which Mr McKenzie had access in which it is said that he, by wilful misconduct, obtained and retained. Can I, in that connection, address and correct a number of unfortunate submissions that were made in relation to Mr McKenzie and page 215 of Exhibit NM-1. Your Honour will recall that Mr Moses took your Honour to the third bullet point on that page and the reference to the fact that on 31 July, Mark O'Brien sent Mr Robert Smith an email about Mick Keelty, and the authorities wish to speak to him about misconduct involving a senior AFP legal officer – a senior AFP officer.

Now, Mr Moses used that entry as the jumping-off point for a number of submissions to the effect that it was obvious from that material that the information was obtained, could only have been obtained by Ms Scott, who is not before the court, obtaining that information from Mr Robert Smith's emails, and that that should have jumped out to Mr McKenzie immediately and raised in his mind a concern that he was obtaining privileged information. The submission in that context went further. It was to say that due, it was suggested, to a lack of care on Mr McKenzie's part, he has rushed out his affidavit, hasn't addressed this problem, that it's a very large problem and that it is destructive in his case. But the problem with that submission is that in Mr McKenzie's exhibit, back at page 200, there is a text message. Your Honour will note the date. It is 31 July 2019, being the very date referred to in Mr McKenzie's email at page 215. It's a text message, a text exchange between Ms Scott and Ms Roberts, and your Honour sees at the top:

Jesus, MOB, just sent BRS an email saying –

it must be –

AFP want to speak with him. He thinks it's got to do with the coffee date –

and then there's the correction AFP. Your Honour sees that it continues. So not only is Mr Moses wrong that this is not, in fact, taken from an email, not only is he wrong that Mr McKenzie would have known at the time he sent his email on 22 March 2021 to Mr Levitan and Bartlett, that it was not taken from an email, but it is not in any way evidence that is supportive of paragraph 35, or paragraph 37 of the amended particular.

MR MOSES: This is between .....

MR YEZERSKI: Mr Moses, unfortunately and regrettably - - -

MR MOSES: That's between .....

MR YEZERSKI: - - - made a series of assertions that Mr McKenzie had lied, that he had given false evidence in respect to this email. Those allegations should be withdrawn, and an apology should be made. Now, with respect, this error on the part of Mr Moses, but not on the part of my client, demonstrates why it is incumbent on the appellant to identify, with precision, each instance in which it is said that there is evidence that Mr McKenzie wilfully obtained, and retained, confidential and legal privilege information with respect to Mr Roberts-Smith's legal strategy. It gets worse, of course, because, your Honour, the few examples that your Honour was taken to, such as the emails between Ms Allen and Ms Roberts, could never be described as the appellant's confidential and privileged legal strategy with respect to the trial. They just don't meet that description. So - - -

HIS HONOUR: But that's a question for next week.

MR YEZERSKI: That is a question for next week, but my point is, this is why we need to know with real precision what is relied upon, and it may be appropriate, particularly given what has transpired this afternoon, your Honour, in the unfortunate submissions, that a direction be made that the appellant notify us of each instance they rely on, and do so concurrently with their submissions being due tomorrow. Can I - - -

HIS HONOUR: Well, I've got to decide it on the basis that what I've been told today about ages 209, 215, and the reference to the legal strategy and the active briefing, is the - - -

MR YEZERSKI: Is the .....

HIS HONOUR: - - - particulars ..... case, which I am deciding the subpoena and notice to produce issues by reference to.

MR YEZERSKI: Yes, and with respect, your Honour, that's appropriate. Now, in that connection, Mr Moses made a number of submissions as to the speed and urgency with which the amended notice of appeal was prepared. It sounded at times

like that was the lead-in to an amendment application, or he had written to the appellant on numerous occasions as to the prejudice that would be occasioned by a late amendment. I don't need to say further – anything further, but particularly when they've had Mr McKenzie's affidavit for over a week, any late amendment would be strenuously resisted. The final point is, again, a debate for next week, but lest there be any misunderstanding, Mr Moses said we bear the onus next week. We, of course, do not bear the onus next week on anything. It's the appellant's onus on its application. I don't think I need to say anything further.

HIS HONOUR: Thank you, Mr Yezerski. Well, I will endeavour to at least make some orders tomorrow morning.

MR MOSES: Your Honour, we've drafted some orders which I've just seen on my iPad, which we will circulate to our friends probably within the next 20 minutes, draft orders that your Honour asked us to draft this morning.

HIS HONOUR: Yes .....

MR MOSES: We will get their input, but I envisage that we probably – if your Honour gives us until 5 o'clock to see whether we can agree with the other side that what we've drafted reflects what your Honour has asked us to do, and then we will send them through to your Honour's associate.

HIS HONOUR: That would be most convenient. And just while I've got both of you, just on the subpoena issue, I would rather think that the appropriate order, regardless of what the outcome will probably be, costs on the cause. Do either of you want to be heard against that?

MR YEZERSKI: No, your Honour.

MR MOSES: No, your Honour. No, no. I think that's entirely appropriate. Yes, your Honour. I won't address what my learned friend sought to raise in respect of that text message, but we will deal with that next week.

HIS HONOUR: Yes.

MR MOSES: Thank you.

HIS HONOUR: All right. Mr Blackburn - - -

MR BLACKBURN: Yes, thank you, your Honour.

HIS HONOUR: - - - did you find your passport?

MR BLACKBURN: Merely to say, yes, they have my passport, your Honour. Your Honour, I merely wish to submit on behalf of my client that we support the making of these orders that are sought. In saying so, however, we don't want to be taken to

be confining ourselves next week on the argument about the subpoenas ad testificandum. We don't want to be taken to confining ourselves on the submissions we make about the relevance and the appropriateness of those subpoenas.

HIS HONOUR: Yes. All right.

MR BLACKBURN: And I have no further submission. If the court pleases.

MR BENDER: That's also my client's position, your Honour.

HIS HONOUR: All right. Well, that can be that can be noted. I am not going to commit to saying I will decide this at 9.30 or 10.15 tomorrow. I will be in touch with the parties to tell them what time we will come up with an answer and I may produce the reason slightly later after that.

MR MOSES: And will you want to require the appearance of counsel at that time?

HIS HONOUR: No, that's fine.

MR MOSES: Please the court.

HIS HONOUR: In fact, I've actually had a very – for unrelated reasons, I've been having a close look at the Act and rules and I have a sneaking suspicion that you don't actually have to publish interlocutory judgments in open court, but this is a very close reading of the Act and Rules.

MR MOSES: Please the court, your Honour.

HIS HONOUR: All right. Well, thank you for your assistance. The court will no adjourn.

MATTER ADJOURNED at 3.22 pm UNTIL THURSDAY, 1 MAY 2025

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